

Selected Readings in Chinese Legal System

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Turku, Finland
Informyth

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Preface

“Chinese legal system” is becoming an increasingly interesting course in European universities. Within the lectures, a bird's eye view on the framework can be discussed with the instructions of the teacher. Usually, more advanced readings can also play a more important role than lectures but they together reach the same goals.

The purpose of this book is to provide my students with after-class supplementary references. This book collected 20 articles written by prestigious experts of the world. They cover topics from fundamental theory, constitution and other branches of Chinese laws. Thanks to digitalization, all of these articles are re-printed here in full-text and almost in their original forms. With the development of the course, this book will be updated and expanded soon.

All ideas of these authors as well as mine in the lectures are all open to study and discussion by my students, who independently had, now have, and will have their own judgment.

X. L.

Turku, Finland, February 2015

Sources and Acknowledgements

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Introduction:

Fundamental Features of Contemporary Chinese Legal System

Xingan Li

Abstract

The purpose of this article is to summarize characteristics of Chinese legal system, with special regard to empirical observation of its contemporary development. China is a large country ruled by Communist Party, which is one of the three large-scale conquests by external power and interruption of traditional Chinese culture. The most significant result of such conquests has been the justification of rule by minority over majority, whose obedience to law was based on the terror of the law. In Chinese history, there happened frequent supersession of dynasties, each of which was ruled by one or more families. Many revolutionaries and reforms were a process of deprivation of property by military force or by political power. Because of latest conquests of outside ethnic groups, today's China is one or two steps lagged behind the Western world. In addition, Marxism resolutely, cleanly, and thoroughly swept all those splendid elements of Chinese culture. With the party's dominance in Chinese politics and law, today's Chinese legal system became a blended entity of the Soviet, the Chinese Communist and the Chinese traditional, and the Western elements. Compared with those laws regulating economic activities, far less change was introduced to the reform of the constitution and the political system. Furthermore, Chinese legal system has been snugly manoeuvred by political ambition of the leaders. All these characterize the Chinese legal system.

Keywords: Chinese legal system, Chinese politics, communism, revolution, reform, law as a weapon

Introduction

China is the third largest country by surface area, the first largest country by population, and the second largest country by Gross domestic product (GDP), with the world's largest ruling party housing more than 86.686 million members (Organization Department of the Communist Party of China Central Committee 2014). China is also one of the countries with the longest history. In recent two millennia, the first part of the history witnessed a long-term stable ascending process; while the latter part showed a basically descending tendency. Of course, recent 30 years were an exception, which apparently reversed the declining, partly because the Chinese have been seeking integration and cooperation with the civilized world, after long autarky and isolationism from Qing dynasty up to end of 1970s.

Due to its influence on world history and world politics, China has become one of the most interesting topics in today's academia. There is also increasing worldwide interest in Chinese legal system, reasons ranging from education, business, human rights, to diplomacy. Much research has been done on Chinese legal system as a whole, or on different branches of laws, different units of judiciary, different stages of development, and so on. To study on Chinese legal system from different standpoints, either static or dynamic, can draw conclusions significantly differently. In the sense of writers of Chinese origin, there could be dissidents, moderate and radical critics from either outside or within the system, victims, reform advocates, as well as supporters, defenders, opportunists, yes-men, or those with vested interests, all making their judgment selectively.

The purpose of this article is to add knowledge to the research on characteristics of Chinese legal system, with particular regard to its contemporary situation on the foundation of historical development. Following this introduction, the article will sequentially go through how the Chinese legal system was historically shaped by such aspects as minority conquests and minority rule, missing of coherent protection of property right in Chinese legal history, three cultural catastrophes, the scam of communism, the farraginous system, the unbalanced change of law, and the rule of man. Finally, the article will be briefly concluded with characteristics of Chinese legal system from these aspects, the core of which is adventitious shock or destruction of traditional Chinese culture during frequent colonization by alien ethnic groups that were at the time economically and culturally unenlightened, or by alien ideological trend, in the case of communism, that was a sophisticated politico-legal scam.

Minority conquests and minority rule prioritized and justified

Since the birth of the first Chinese empire, Qin, in 221 B. C., China has almost been a country under governance of ethnic majority, except, among other things, in the Yuan Dynasty (1271-1368) when China was conquered by Mongols, and in the Qing Dynasty (1644-1911) when China was conquered by Manchus. These two dynasties were both characterized by continuous genocide of indigenous Chinese people; more than one hundred million of Chinese people were slaughtered during these two conquests. During these 363 years, China was one of the world's biggest colonies in the history, when millions of Chinese people were massacred and majority of the population were ruled by far fewer ethnic minorities (concerning massacres by Mongols alone, see Fitzgerald 1938, p. 433; Roberts 1976, p. 299). Today's mainstream political power in China seems to accept that conquests of both the Mongols and Manchus as domestic contradictions. Genghis Khan, Mongols' leader, and Nurhachu, Manchus' leader, have increasingly been regarded as heroic persons of "ancient China". These are completely wrong and even embarrassing ideas, but are prevailing in China. That is another version of the story.

Whatever, the result of such interruption of Confucian cultural tradition and political ecosystem, to a certain extent justified the rule by the minority, the rule by the aristocrats, and the rule by the power of coercion. This did not change even when most of the world's major civilizations changed: democratic ideas did not prevail as the most Chinese desired. In such a society, the conception of the majority, the mass, or the people has always been the synonym of the weak, the poor, and the inferior, the legal protection of whom has always been tantalizingly out of reach. Law has always been the enemy of people, but not their friend. Therefore, people's obedience to law was based on the terror of the law, but not the reverence to the law.

In turn, law could only restrain the behaviour of those who were psychologically weak, but not the acts of those who dared to resist. As a result, regardless of good or bad laws, no one would follow it voluntarily. The reality has been more like such: law is used to punish the bad guys, but not so much used to protect the good guys. Punishment is more easily realized than protection. For example, there is not a lack of popular slogans such as "take law as a weapon", "pick up the weapon of law", etc. That's why the pursuance of a society governed by law was such a hard journey for grassroots of today's China. That's also why penal system is more powerful and emphasized than social welfare system.

Property right not coherently protected

Another significant phenomenon is that, history of China was characterised by frequent supersession of dynasties, each of which was ruled by one or more families. When one dynasty was superseded by another, there were always vehement violence, riots, sabotages, and vandals. Therefore, in Chinese history, it could be said that there were temporarily glorious and prosperous kingdoms one after another, but lacking of succession of wealth of one generation by another generation. Averagely, people were poor due to lack of safety. Elite classes merely existed among those groups close to the core of the political power. Right to property has never been really developed and respected in laws of any dynasties. In addition, fair transaction in market economy has never been ensured.

The logic behind the politico-legal system has been that: people's properties are those of the state; the properties of the state are those of the ruler. In turn, the ruler can play the whole state, while the state can play the whole people, without any price. Once the ruling families fell down, the country's social lives all changed: the officials would be persecuted; the wealthy class would be looted; the grassroots would be displaced; while new officials and new wealthy class would substitute the old ones, without any reasoning according to law, but only from coercion of power. Coercion is the only source of political power and the only source of wealth. In fact, many revolutionaries and reforms in the history of China were a process of deprivation of property by military force or by political power.

According to the Chinese version of communist ideology, all previous regimes, thought to be ruled by a so-called exploiting class, were unjustifiable. Contradictorily, this version of ideology justifies every violent revolution, overthrowing the regime that used to last hundreds of years. Once the same group established a new regime, according to this ideology, it was inevitably an unjustifiable state ruled by the exploiting class. Mainstream Chinese history textbooks praise nearly every ancient violent riot of the ruled class against the ruling class, including seizing their property, depriving of their titles, and even eliminating them physically. By doing so, the overthrowing of the Nationalist government by the Communist Party, and thus confiscating landlords' and capitalists' property by emerging proletariat group without any compensation was justified.

Three cultural catastrophes

Once upon a time, China was two or three steps in advance of most of the today's Western countries. After China suffered from two large-scale and more small-scale socio-cultural catastrophes caused by conquerors of outside ethnic groups, today's China is one or two steps lagged behind the Western world.

During Ming dynasty, China was both open and developed in commerce. Elements of early capitalism already emerged. The invasion of the Manchus interrupted the process of capitalization and modernization. Qing dynasty adopted the close door policy and practised the literary inquisition or speech crime. Thousands of volumes of Chinese books were banned and burned by the Manchus, and the rest books were artificially revised (Goodrich 1935; Kessler 1971).

An assumption can suggest that, without these interruptions of cultural tradition, today's China should be more developed in both socio-economic and politico-legal systems. Naturally, writers in contemporary Chinese politics and law must mention the influence of Marxism and its Chinese subspecies. The embrace of Marxism in last century is tantamount to the third conquer equivalent to those by Mongols and Manchus. While the Mongols and the Manchus finally somewhat accepted Confucianism, or at least admitted the existence of Confucianism in mostly Chinese populated regions, Marxism resolutely, cleanly, and thoroughly swept all those splendid elements of Chinese culture.

The scam of communism

The practise of Marxism in China resulted in a creation of the Communist regime. Frequent “revolutionary” movements, back and forth, destroyed all those hopes for maintaining a slightly stable life. In 1947, when the Communist Party of China passed the “Outline of Land Law”, announced that all landlords’ ownership of land should be abolished (Article 2). Landlords’ livestock, farm tools, housing, food and other property were also confiscated (Article 8). The central government of the People's Republic of China published a Land Reform Law on June 30, 1950. The law abrogated ownership of land by landlords and introduced peasant landownership. Land was confiscated from former landlords and redistributed to landless peasants and owners of small plots, as well as to the landlords themselves, who now had to cultivate the land to earn a living.

Furthermore, the Administration Council of China (later State Council) passed the Decision on Division of Rural Class Components in 1950, and subsequently, people in rural areas were divided into five different components: landlords, rich peasants, middle peasants, poor peasants, and workers. According to the target set by Mao Zedong, the leader of the Communist Party of China, in 1948, landlords, that is, ten percent of rural population should be hit hard (Mao, 1948). It means that millions of people were eliminated physically. The figure ranged from one million to twenty million according to different literature. An exact figure is not available, and such estimation does not matter. But the organized violence by the name of the revolutionary destroyed a long developed social order after many tribulations.

Private property has completely been deprived of by the Communist regime by 1960s in the name of nationalization and collectivization. Then the state-owned and collective-owned property was smuggled to another benefit group through such tricks as privatization, shareholding system reform, and so on. Stripping off all the masks, the Communism is simply a movement of one small violent and fraudulent group against the people, the mass, and the majority. Communist revolution was the biggest ever scam in political science, in jurisprudence, and in sociology, because presently, China became one of world's biggest capitalist economies ruled by the world's wealthiest class in the name of the world's biggest ruling party. The party's dominance in Chinese politics and law is another characteristic of Chinese legal system. Therefore, all powers of the state come from the people, but people can only be represented by the party, but not by themselves. It is not strange if it is found that there is the saying that this is a state "of the Party, by the Party and for the Party."

We have another example to spell out the communist legal system is packed by laws and regulations one after another. In 107 articles of the 1995 Labour Law of the People's Republic of China, the term "Gongchandang" (the Communist Party of China) is not mentioned, while the term "Gonghui" (trade union) was mentioned 14 times in eight articles. In 2001 Trade Union Law of the People's Republic of China, Article 4 stipulated that trade union "shall support the leadership of the Communist Party of China." This is the only clause in this law to mention the Party. In 2013 Constitution of the Chinese Trade Unions, the term "Dang" (Party) was mentioned seven times. In law, the Chinese trade unions are under the leadership of the Communist Party of China, serving as a bridge and link between the Party and workers (General Principles of Trade Union Law), and shall adhere to the Party's basic line (Article 31). As a result of these provisions, it is impossible to separate trade unions from the Party. The trade unions are popularly regarded as vassals and puppets of the Party.

A farraginous legal system

On February 22, 1949, Chinese Communist Party Central Committee decided to abolish Six Codes of the nationalist regime (Chinese Communist Party Central Committee 1949). Following the foundation of the new regime in 1949, closely mimicking the model of the former Soviet Union, a new Chinese legal system took shape soon. However, after a short period, even such a system was trashed when the police, court and procuratorate were all "smashed" (Zimmerman 2014, pp. 51-43). During the Great Proletarian Cultural Revolution, the Revolutionary Committee was stipulated as the executive in 1975 and 1978 constitution (1975 Constitution, Articles 22-23; 1978 Constitution, Articles 34-37). However, the Revolutionary Committee alone was the *de facto* legislature,

executive, and judiciary. In addition, in 1975 Constitution, basic “rights and obligations” of Chinese citizens are “to support the leadership of the Chinese Communist Party and the socialist system, and to obey the Constitution and law of the People's Republic of China.” (1975 Constitution, Article 26) In these two 1970s’ constitutions, the Chinese Communist Party was clearly stipulated as the core of leadership of people of whole China (both in Articles 2). In fact, although the 1982 current Constitution removed such clauses, the Chinese Communist Party is still the core of leadership, and it is the obligation of people of the whole China to support the Party.

Around 1978, re-establishment of a judicial system was launched by new political leaders. But the first efforts were to re-use the former Soviet Union’s old and new laws, change and even challenge of which were allowed. As a result of these efforts, the initial framework of the contemporary Chinese legal system was formed. Accordingly, the inherent structure of this system was that of the Soviet Union. Borrowing from the then communist counterparts was thought to be safe from Westernization or capitalization, and thus safe from internal criticism. The earliest laws of China passed in the 1970s and 1980s were full of silhouettes of that of the Soviet Union, partly because many of the authoritative jurists were those who studied in the Soviet Union, or those who studied in Chinese universities where the Soviet teachers taught laws, or those who learned Russian language and could understand the Soviet legal literature.

Since 1980s, Chinese innovation and borrowing from the Western countries also took place due to the imperative demand brought about by the economic development. Learning from the Western legal systems has been a fashionable practise among jurists. Western and comparative law courses were increasingly taught at many universities. Many new laws promulgated in 1990s and 2000s modelled those of Western countries, with adjustment according to the situation of China. However, these were restrictively limited to economic sphere. That’s why today’s Chinese legal system became a blended entity of the Soviet, the Chinese Communist and the Chinese traditional, and the Western elements.

Many people are curious about such a statement, but if looking at the current Companies Law of 2005, it is easy to understand what the farraginous system means. Among others, the law included special provisions on wholly stated-owned companies (Companies Law Articles 65-71), number and scale of which are incomparable all over the world economies. Particularly, in all companies, in Article 19 of this law stipulated that, “Communist Party organizations shall, in accordance with the provisions of the Constitution of the Communist Party of China, be set up to carry out activities of the Party. Companies shall stipulate the necessary conditions for the Party organizations to carry out their activities.”

Unbalanced development of law

The constitution and the political system were to some extent touched by the development of the legal system. According to the 1975 and 1978 Constitutions, the state deprives the landlords, rich peasants, reactionary capitalists and other bad elements of political rights according to law, and at the same time provides them with the opportunity to earn a living so that they may be reformed through labour and become law-abiding citizens supporting themselves by their own labour (Article 14 of 1975 Constitution; Article 18 of 1978 Constitution. The texts were slightly different).

However, compared with those laws regulating economic activities, far less change was introduced to the reform of the constitution and the political system. “A system with Chinese characteristics” can exactly mean capitalism in economy, but communism in politics. The process of capitalization subtly smuggled the wealth of the whole country to those who were politically powerful, while the continuation of the communist ideal played down any challenge to the existing benefit group. In 2007, when most of the families from the benefit group shared the country’s wealth, they lost no time to pass a property law, designed to protect private property. Consequently, we can conclude that there exists adroit mystery machinery in contemporary Chinese legal system to facilitate flexibility or fixity. We can admit that, this might not be the carefully planned process, but if the 70-year history could be condensed in one page, you can read it as such clearly.

The rule of man

One more feature of Chinese legal system is that it has been snugly manoeuvred by political ambition of the leaders. In China, international law can have its market when and only when the leaders will play tricks with other countries, for example, with the former Soviet Union in 1960s and with Vietnam in 1980s. For a long time, China has not cared about its territory, such as Diaoyu Islands and Nansha Islands, the kind of forgetting such a thing like international law.

In many other cases, China dealt with foreign diplomacy based on usual practice as that in dealing with private relationship, lack of using the principles of modern international law. It is understandable that in the beginning of the communist regime, there were few international law experts. But it is hardly understandable that even today, Chinese diplomacy seems to be more emotional than reasonable. Naturally, this is also an integrated part of the Chinese politics, which shall be maintained by what the ruling party thinks to be the best choices. Such an attitude toward international law is one of the best choices. Hence there is an underdeveloped international law, or

an underdeveloped use of international law. Nevertheless we can see that such a situation is being slightly changed.

After these examples, if we array critical elements in Chinese legal system, we can begin from the rule of law. Private law gives place to public law; public law gives place to politics; politics gives place to the Party's policy; and the Party's policy gives way to leader-will. Leader-will is akin to rule of man. It is not directly evaluable which is better, the rule of law or rule of man, in China. But Chinese legal system after all is the rule of man. The role of rule of man depends on charisma of leaders, whether they are good or they are bad, but not much on the availability of law. Fortunately, contemporary leaders create or meet one of the best historical opportunities when China enjoys a long-term peaceful development. Many political and legal problems are solved with ease, and a systematic legal framework has also taken a shape.

Conclusions

In a word, history made the Chinese legal system unique. In the last century, Communist Party launched one of the three full-scale conquests of China by external power and interruption of traditional Chinese culture. The most significant result of such conquests has been the justification of rule by minority over majority, whose obedience to law was based on the terror of the law but not voluntariness. Chinese history also witnessed frequent supersession of dynasties, each of which was ruled by one or more families, who exercises full control of the political, legal and economic power. Many revolutionaries and reforms were a process of deprivation of property by military force or by political power. Because of latest conquests of outside ethnic groups, today's China is one or two steps lagged behind the Western world. In addition, Marxism resolutely, cleanly, and thoroughly swept all those splendid elements of Chinese culture. With the party's dominance in Chinese politics and law, today's Chinese legal system became a blended entity of the Soviet, the Chinese Communist and the Chinese traditional, and the Western elements. Compared with those laws regulating economic activities, far less change was introduced to the reform of the constitution and the political system. Furthermore, Chinese legal system has been snugly manoeuvred by political ambition of the leaders.

It must be noted that Chinese legal system under Communist Party of China has no rules to follow, just as the regime's historical development. There do no exist answers to such questions as "What has been done?" "What shall or what should be done?" or "What will be the future?" The Party, with some more magic of reform, is expected to rule the country for some longer time, when the legal system is to be updated and updated. However, will the history repeat itself?

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MEANINGS OF ARCHAIC LAW IN THE WORK OF CONFUCIUS AS A SOURCE OF CHINESE LAW

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Abstract

Confucius's ideas are a basic element in the thinking and evolution of mankind, bringing a very important contribution in the development of law principles. Confucius's ideas on Law and the principles by which society is organized and managed properly can be summarized in the following lessons: "The superior man is dominated by love of justice, the common man is dominated by the love of gain". Confucius required to be respected traditions, customs and rituals in order to have a stronger society and citizens that obey the laws. The teachings of Confucius were a main source of law which later formed the principles of Chinese law.

Keywords: *law, China, Chinese law*

JEL Classification: *K 10, K 19*

I. INTRODUCTION

For most of the history of China, its **legal system has been based on the Confucian philosophy** of social control through moral education, as well as the Legalist emphasis on codified law and criminal sanction.

In the philosophy of Confucius we find a rigorous systematization of ancient customs because its teachings are based on research traditions, customs from different administrative regions with local traditions.(Bonciog, 2010)

One of the major Chinese philosophical schools - the Confucianism - strongly influenced the idea of law in China. Briefly, under Confucianism, the state should lead the people with virtue and thus create a sense of shame which will prevent bad conduct.

Historically, the people's awareness and acceptance of ethical norms was shaped far more by the pervasive influence of custom and usage of property and by inculcating moral precepts than by any formally enacted system of law.

Master Kong Qiu (Kong Fu Zi) called by Europeans in the seventeenth century, Confucius was born on August 27, 551 BC. in the village of Lu in the Shandong province. it is assumed that its genealogical tree would have to move the king Yellow - Xuanyuan (2697-2597 BC), regarded as the founder of the first Chinese state structures - Huang He, the Yellow River valley. Confucius's ideas are a basic element in the thinking and evolution of mankind, bringing a very important contribution in the **development of law principles**.

II. CONFUCIANISM – A MAJOR CLASSICAL LEGAL THEORY

In the year 518 BC Confucius chose the capital Louyang in order to know imperial rituals and the life of people in the lands Qin, Song, Wei, Cheng. He occupied a number of positions as governor, minister, counselor in the land administration Li.

There are three basic elements in Confucianism: “Ren”, “Li” and “Dao”, which show the fundamental value of Confucianism. It is very necessary to analyze these basic elements and find the relationship among them, so as to picture the thinking way of Confucianism and its difference from the rule of law. (Guoji, 2008)

The basic premise of Confucianism is the idea that human beings are fundamentally good. With this optimistic view on human potential, Confucius advocates for ruling through li – traditional customs, mores, and norms – which allow people to have a sense of shame and become humane people with good character, rather than through government regulations and penal law. The idea is that people will internalize the acceptable norms and only take proper actions. This will not only lead to a harmonious social order, but it will also provide the additional benefit of improving an individual’s inner character and the overall quality of the society. (http://en.wikipedia.org/wiki/Chinese_law)

The approach and attempt to know and then transmits the ideas and teachings of Kong Zi - Confucius defining step requires knowledge of the period he lived in great thinker. Confucius's name is attributed to the end of the first part of the Zhou Dynasty - Spring and Autumn Period (770-476 BC). Zhou dynasty known as the classical age of Chinese culture and civilization, marking eight centuries of Chinese history 1046-221 BC and fall in phase transition from slave to feudal society. Historians have classified Chinese Zhou Dynasty developments in the following steps:

- 1046 - 770 BC. Zhou era o early or Sunset / West Era;
- 770 - 221 BC. Late or Eastern Zhou, divided in Spring and Autumn Period - Chunqiu (770 - 476 BC.) Spring and Autumn Period bearing the designations from chronic principality Li - Spring and Autumn Annals. Main events ranging between 722-481 were conducted in spring and autumn and were referred to the ideograms - Chun and Qiu - spring and autumn;
- 476 - 221 BC. Shitai Zhanguo - Warring States Period. (Buzatu, 2009)

The vision researcher Anne Cheng Zhou period is based on three main ideas: “royalty, the principle of hereditary transmission of the titles and functions and unifying power of a religious system centered on King”. (Cheng, 2001)

During the United Zhou lived most important philosophers and Chinese thinkers among which Confucius, Lao-zi, Meng-zi (Mencius), Mo-zi.

Like Socrates, Confucius did not leave humanity a work written. (Drimba, 1984)

The works attributed to the great thinker were edited after his death. Professor George Vlăduțescu states that “the four books of the school founded by Confucius Da Xue - *Great study*, Zhong-Yong - *invariability on the middle way*, Lun Yu - *Analects* and Meng Zi, which according to tradition is called after the writer name, are Confucians by the spirit, but not by the letter / word”. (Vladutescu, 1980)

Confucius philosophy was built on three important pillars:

- man is an individual who belongs to nature and society and in this context he must shape the way in life understanding harmony universal order;
- man actions at individual level but also at the community level must focus their actions based on moral principles and hence how government extended a state must have the foundation of moral principles;
- any action, fact committed by individual must fall in observance of rites, the reverse coin observance of rites leads to disharmony and chaos.

Theories of Confucius are based on the principle of humanity and generosity - jen. This principle considered that all people are good by nature flesh, but to preserve and develop morality education is required. In order to discover the human knowledge the perfect man must help his fellows to fulfill their ideals. "Jen is the nobility of Heaven, the dignity of man (...) and every man has it in himself. If man is Jen as natural aptitude, this virtue must be developed through a complete education, the only way able to transform ordinary individual in true man." This education can not be imposed from outside, it is self-knowledge, self-discipline. Following jen, man will remain faithful to the principles of its own nature - zhong, he will apply them on others as on himself - chou, he will practice honesty and fairness - yi, he will be kind and generous, will respect filial devotion and he will obey and will respect the laws". (Brosse, 2007)

Confucius's ideas on Law and the principles by which society is organized and managed properly can be summarized in the following lessons: "The superior man is dominated by love of justice, the common man is dominated by the love of gain". (Buzatu, 2009)

Related to this, Confucius promoted the design / conceiving and implementation principles such as: governmental morality, social justice, leadership and management support to the political institutions of an exemplary moral person and a good education, and in the state must be continually trained officials as pawns of good governance.(Buzatu, 2009) Confucius believes that: "To govern means to keep right."

Confucius tried to find solutions to fix some imperfections functioning of contemporary society with him, so that "any restoring order in the society in accordance with the cosmic order - the mandate of Heaven, is about human definition model - kiun-zi." (Brosse, 2007)

In the same time Confucius required to be respected traditions, customs and rituals in order to have a stronger society and citizens that obey the laws.

Codified laws require external compliance, and people may abide by the laws without fully understanding the reason for compliance. As such, a social order achieved through formal laws does not come with the additional benefit of better citizenry. It is worth noting, however, that even Confucius did not advocate for the elimination of formal laws. Rather, according to Confucius, laws should be used minimally and reserved only for those that insist on pursuing one's self-interests without taking into account the well being of the society.(http://en.wikipedia.org/wiki/Chinese_law)

In his work "The Great Study", Confucius focused on the presentation of the way to perfection through knowledge in harmony with the principles of universal order. In this work Confucius underline that a leader who wants to lead the people right has to "make the world to enjoy peace and harmony." (Confucius) Related to this, the great thinker urged the governing "to watch carefully upon the rational and moral principle from him. If the governing will have virtues arising from the rational and moral principle, then he will have the people hearts, and if he will have the people hearts, he will have the territory; if he will have the territory, he will have its income; if he will have the income, then he will be able to use them to manage the state." (Confucius)

The Confucius recommends that the leader has a moral behavior and not to focus on the personal gains because that will cause that citizens will have as goal their own earnings, to the detriment of society. If the prince will respect public property and will use fair the public revenue then "people will remain within the limits of order and obedience." (Confucius)

The great philosopher wanted to print the pages of history the idea that "the nation Chu does not believes that gold ornaments and stones are precious, but for this nation the virtuous people, good and wise public servants are the only things considered to be precious."(Confucius)

In the work *Unchanging on the middle path* Confucius identified nine rules that the government should follow “self-correction and self-improvement, the worship of the wise, the love of parents, honoring the first state officials or ministers, to be in perfect harmony with all other officials or magistrates, treat and love people like a son, to attract /draw around him all the wise and artists, to welcome the people and the foreigners who come from far away, to deal with friendship all the great vassals.”(Confucius) An important element that is developed in the work *Unchanging on the middle path* is defining the human ideal according with the principle of honesty based on the communion between harmony and balance.

As Confucius rejects the general use of formal laws to achieve social order, what lies vital to Confucius’ theory is the willing participation by citizens of the society to search for commonly accepted, cooperative solutions. In addition to willing participation of citizens, there must also be grounds or bases upon which commonly acceptable solutions can be arrived at - the concept known as li. Li is commonly understood as a set of culturally and socially valued norms that provide guidance to proper behaviors that will ultimately lead to a harmonious society.

These norms are not fixed or unchangeable over time but rather a reflection of what is accepted at a particular time in a particular context. When conflicts arise, the li have to be applied and interpreted to produce a just result and restore the harmony of the society. However, in the absence of any procedural safeguard afforded by codified laws, interpretation of li is subject to abuse.(http://en.wikipedia.org/wiki/Chinese_law)

Concerning the development of the state's financial development, Confucius presented this situation: “When a prince loves humanity and practices virtue, it is impossible for people to not love righteousness, and when people love justice, it is impossible not to have a prince with all his tasks happy satisfied; and also the taxes properly required to not be paid properly.”(Confucius)

In addition to good preparation and fairness as essential qualities, Confucius believes that people should not “be anxious that they do not have public jobs, but to be concerned to acquire the skills needed to occupy those positions. Do not be grieved that are you are not yet known, but look for to become worthy of being known.”(Confucius) More than that, the great philosopher denounced the old system which was based on heredity transmission functions within the nobility system and proposed that the appointment and promotion in the civil service to start from fairness and good training: “training of persons possessing competence and moral integrity and attribution of the positions based on merit only.” (Lazar, 2007)

These principles for the organization of examinations for the selection of civil servants were respected until 1991 when the Qing dynasty was removed. Confucius's name is linked to the development of private education in China. As a way of teaching he encouraged debates on various topics and focuses on judgment.(Budura, 2010)

III.CONCLUSIONS

Recognizing that people in a society hold diverse interests, Confucius charges the ruler with the responsibility to unify these interests and maintain social order. This is not done by dictatorship but by setting an example. Therefore, a ruler needs not to force his people to behave properly. Instead, the ruler needs only to make himself respectful, and the people will be induced and enlightened by his superior virtues to follow his example – an ideal known as wuwei. Nevertheless, the ruler must know and understand the li to be able to create solutions to conflict and problems the society faces. As the people are to follow the moral standards and example set by the ruler, to a large extent, the quality of the ruler determines the quality of the political order.(http://en.wikipedia.org/wiki/Chinese_law)

The teachings of Confucius were a main source of law which later formed the principles of Chinese law. Emperor Han Wudi (156-87) recognized his work as state doctrine and represented the foundation of empires that have succeeded until 1911, when the founding of the Republic of China occurs.

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**LEGAL CULTURE AND LEGAL TRANSPLANTS -CONVERGENCE
OF CIVIL LAW AND COMMON LAW TRADITIONS IN CHINESE
PRIVATE LAW**

JOHN SHIJIAN MO *

I. Introduction. -II. Explaining the Concepts of Legal Culture and Legal Transplant. -
III. Transplanting Civil Law in China - 1. Legal Transplant in the Qin Dynasty - 2.
Legal Transplant before 1949. - 3. Legal Transplants Since 1949 - IV. Convergence of
Civil Law and Common Law since 1978. - 1. Civil Law Features in Chinese Private Law
- 2. Common Law Features in Chinese Private Law. - V. Conclusion: A Convergent
Legal System of Chinese Characteristics

I. Introduction

“Legal culture” and “legal transplant”, although the term “legal culture” is sometime vague and arguable¹, are two of the essential concepts in the field of comparative law study or comparative jurisprudence, which is a creation of Western legal scholars.² The Chinese legal academics began to pay serious attention to the concept of legal culture in the middle of 1980s.³ They also began to study legal transplants probably at the same time as they noted seriously the subject of legal culture, although it is not possible to determine when the term is first time introduced into Chinese legal studies. This is probably due to the fact that by definition, legal transplant refers to a practice or fact concerning the development of legal system in a country,⁴ but legal culture

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¹ The term “legal culture” is considered to be a vague and uncertain concept. See John Gillespie, “Towards A Discursive Analysis Of Legal Transfers Into Developing East Asia”, (2008) 40 N.Y.U. J. Int'l L. & Pol. 657, at 676.

² Montesquieu is commonly believed to be the father of comparative law study. See Wikipedia at http://en.wikipedia.org/wiki/Comparative_law#cite_note-1.

³ For example, Guohua Sun, Basic Legal Theories, Tianjin, People's Press of Tianjin, 1988. (in Chinese). This book is considered to be one of earliest books since 1978 discussing legal culture in Chinese context.

⁴ The term “legal transplant” means “the transfer of legal norms and institutions from one legal system to another”, see Ralf Michaels, Comparative

itself is usually a subject of study.⁵ But both terms became significant to Chinese legal studies only after China began to build its present legal system since 1978, when the so-called “open door” policy was adopted in China.

In spite of the existing differences in the understanding of legal culture across the world, the history of Chinese legal culture is as rich as the Chinese history itself. But legal transplant, namely the introduction of foreign legal knowledge and ideas into China took place only around 1840s, when more and more foreign visitors and priests began to translate foreign treatises of international law into Chinese. The choice of international law treatises to be the first to translate was logical, because foreign visitors and priests expected to be treated in China with at least the basic international law standards accepted by their home countries. The need for China to know such standards was also obvious, because the then Qing Dynasty Government lacked basic knowledge and skills, which were packaged into a set of behavioral norms known as international law, in dealing with foreign powers juggling with the knife of war or club of trade, or alternatively the knife of trade or club of war often menacingly and un-expectantly. Legal transplant in such context had only minimal impact to the development of Chinese domestic law then, because the introduction of international law into China in such background at most resulting in the transplantation of no more than a set of special norms governing foreign-related activities which eventually led to the establishment of extra-territorial jurisdiction in the Chinese history. The real legal transplant took place in China in the end of 19th century and beginning of the 20th century, when China began to rewrite its laws by following the Japanese model of transplanting the Civil law from Europe. The impact of such legal transplant is visible today because China still claims to be a country of Civil law tradition, even though a strong convergence of both Civil law and

Law By Numbers? Legal Origins Thesis, Doing Business Reports, And The Silence Of Traditional Comparative Law”, (2009) 57 Am. J. Comp. L. 765, at 787.

⁵ The term “legal culture” can be understood as meaning a “specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.” John Bell, *English and French Law--Not So Different?* (1995) 48 Current Legal Probs. 63.

Common law has been seen, as this paper argues, in the past 30-year history of legal developments in China.

Even the Chinese legal culture can be thousand year rich in history, the present Chinese legal system has not been influenced much by that part of legal culture. Or alternatively, the Chinese legal history before legal transplant taking place in China does not have significant impact to the present Chinese legal culture centered on the present legal system. Therefore, legal culture and legal transplant in this paper are two interactive concepts evolving with transplanting of Civil law into China since early 20th century and transplanting of Common law into China since 1978. In another word, the use of legal culture and legal transplant in this paper is qualified by the convergence of Civil law and Common law in China.

This paper consists of five parts. This present part is the first. The second part deals with briefly the understandings of legal culture and legal transplant, in particular the differences between the Chinese views and foreign views, if any, on the two essential concepts. The third part examines the transplant of Civil law in China, including a review of the early efforts in such transplant. The fourth part examines the concurrent transplant of Common law in China, which is arguably a new phenomenon. The last part is the conclusion, which summarizes major features of the convergence of Civil law and Common law in China.

II. Explaining the Concepts of Legal Culture and Legal Transplant

It has been generally accepted that Prof Lawrence M. Friedman of the United States is the first one to use the term “legal culture” in his article “Legal Culture and Social Development”, published in 1969 *Legal and Social Review*.⁶ The combination of the words “legal” and “culture” creates a handy expression for scholars wishing to study legal issues from a much broad social, political, cultural, economic and historical perspective, and due to varying

⁶ David Nelkin, “Using the Concept of Legal Culture”, available from eScholarship at <http://escholarship.org/uc/item/7dk1j7hm>.

understandings on the values and cultures in any given society,⁷ there has been no uniformity in the use of the term “legal culture” in any given country even though the term has obtained enormous popularity in the world today.

“Legal culture”, and actually it is the Chinese translation of the term, has been popular in China since the 1980s, although understandings and definitions of legal culture vary among Chinese scholars. One of representative views on the meaning of legal culture is Mr Zhiping Liang’s understanding of legal culture. He defines legal culture from two alternative perspectives: the wide approach defines legal culture as being inclusive of all law-related elements, such as legal thoughts, legal conscience, legal acts, legal institutions, implementing mechanism, and the symbolic system consisting of codes, precedents, customary law and practices; but the narrow approach defines legal culture as a body consisting of law in formality (such as codes, legal institutions and facilities) and legal values (such as knowledge, beliefs, judgment and attitude), as well as human behaviors of those closed-related to law.⁸ Obviously, Chinese scholars have not only learnt the concept of legal culture from their Western counterparts, but also attempted to understand and apply the concept, which is expressed in Chinese language, by referring to their own cultural and legal backgrounds, in particular relying on their literal reading of the Chinese equivalent to (or Chinese translation of) legal culture.

The term “legal transplant” was created in the 1970’s by Prof Alan Watson of the United States to describe a situation where rules or laws of one legal system or country can be “moved” or “copied” to another legal system, country or culture.⁹ Scholars have since been divided on the meanings of legal transplant, in particular, to what extent and how a transplanted foreign law has to

⁷ Prof Friedman observes that cultural elements in a legal system “are the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole”. Friedman. “Legal Culture and Social Development”, (Aug., 1969) Vol. 4, No. 1, *Law & Society Review*, pp. 29-44, at 34.

⁸ Zhiping Liang, *Debate on Law: the Past, Present and Future of Chinese Law*, Guizhou People’s Press, 1992, pp 12-13, (in Chinese).

⁹ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

be localized and modified to ensure the efficiency of legal transplant. In spite of the differences in the technical or theoretical understandings of legal transplant, legal transplant as a basic approach to the development of national law has been employed by many countries of the world for hundreds of years, and the present division of the Civil law family and Common law family in the world is a very good example for illustrating a process of copying, adopting, accepting or learning from a foreign legal system by any country or jurisdiction which to build or improve its own legal system. It is also a good example of spreading a legal tradition by way of legal transplant. The practice of legal transplant has also been evidenced in China since the beginning of 20th century, when China began to transplant Civil law tradition in China. But transplant is not copying in most cases. Foreign rules have to be modified to address local concerns and local values. It is in this sense, legal transplant is used in this paper.

In summary, it must be pointed out that legal culture in this paper is used in a broad sense, referring to all elements and values that represent and give distinguish characteristics to a particular legal system in a given society, and legal transplant in this paper refers to transplant of foreign rules with adequate and necessary modifications to meet the need of local society.

III. Transplanting Civil Law in China

1. Legal Transplant in the Qin Dynasty

Chinese legal system maintained its unique features of executive-enforced legal rules in the last Monarch of China, the Qin Dynasty. However, facing the increasing conflicts with foreign powers and the pressing danger of falling into a second class country in the warship-shaped new international order evolving since 1840 when the first Opium War broke out, the Qin Dynasty began to transplant Civil law model in China in a hope to improve its capacity to compete with Western countries. In early 20th century, the Qin Government decided to reform Chinese law by following the Japanese model of Civil law. In fact, not only the Japanese law, but also the German and French laws were also studied seriously by the then Qin Government. The reason for China to choose Civil law model in its legal reform was probably

threefold:¹⁰ first, China used to have a comprehensive law code of its own, which was often a combination of all behavioral rules, whether civil, criminal or administrative, and thus to adopt Civil-law style codes was much easier for China than to learn the logic of Common law case law; secondly, Japan was rather a successful model of transforming from an oriental-style country to a Western-style country politically, militarily and economically, which happened to have transplanted the Civil law and thus China could avoid considerable amount of risk of uncertainty in its reform if following the Japanese approach, and thirdly, most influential foreign advisors of the Qing Government were from Continental Europe and naturally Civil law influence should prevail in China. Consequently, China turns into a Civil law country, at least in its formality, slowly and intermittently since early 20th century.

Private law is the first experimental field of China's legal reform. With the assistance of Japanese scholars, the first Civil Code of Qing Dynasty was published in August 1911. But the Code did not have much practical effect at all, because the Qing Dynasty was overthrown soon by the Republicans in October 1911. However, the completion of this Code was significant, representing a fundamental change in Chinese legal culture and legal tradition. At the same time when the Civil Code was prepared, the Commercial Law Code was also drafted. This Code, which had not been completed by the time when the Qing Dynasty was overthrown, was said to contain sections on commercial activities, company law, shipping law and law of negotiable instruments.¹¹ The published Civil Code and the unpublished Commercial Law Code were two of the most important legal developments in the Chinese history of transplanting Civil law in China.

2. Legal Transplant before 1949

Since 1912, China entered into the so-called Republican period of its history. The Republic of China, which now continues

¹⁰ The author has accepted some of the views expressed in Jinxi Li and Guangzu Lin, *Study of Civil and Commercial Law in Taiwan*, Law Press, 1996, pp 4-5 (in Chinese).

¹¹ Jinfan Zhang, *Chinese Legal Tradition and Modern Transformation*, Law Press, 1997, pp 448-469 (in Chinese).

to operate in Taiwan, was established in 1912. Numerous internal wars and the anti-Japanese war were the main characteristics of this part of Chinese history. However, before the People's Republic of China was established in Beijing in 1949, the Republic of China was the official government of China for the period of 1912-1949. Legal transplants continued in the Republican period.

Chinese law began to take the shape of Civil law during the Republican period. On the basis of legal reforms conducted by the Qing Government, the second draft of Chinese Civil Code was completed in 1926, which consisted of rules on general principles, obligations, ownership, family and succession.¹² The second draft was further improved by the Chinese Government in Nanjing between 1929-1933 and many basic rules and systems of Civil law were modified according to commercial, political and social cultures of China.¹³

Although China began to transplant Civil law system in China since early 20th century, the codification of commercial law took place only in a flexible and pragmatic manner. The Qing Government did not complete the draft of commercial law code, nor did the Republican Government in an easy way. A number of law regulating commercial matters were published as individual or specific piece of legislation in 1920s and 1930s, including Law on Stock Exchange Market, Negotiable Instrument Law, Company Law, Maritime Law, Insurance Law, Law on Vessels, Banking Law and Bankruptcy Law.¹⁴ Coincidentally, such practice continued in China after 1978 when China began to develop its present legal system. The simple repetition, at least in the formality of legal development, in Chinese legislative history was the consequence of China reassuming the transplantation of Civil law in China after discontinuation of transplanting Civil law in China between 1949 and 1977 for more than 20 years.

Between 1912 and 1949, China did not have a stable political and economic system. The long lasting military struggle

¹² Jinfan Zhang, *Civilization of Rule of Law in Modern Chinese Society*, CUP Press, 2003, pp 335-338 (in Chinese).

¹³ Ibid.

¹⁴ Quanlai Cao, *Internationalization and Localization*, Beijing University Press, 2005, p 138 (in Chinese).

between the Communists and Nationalists, as well as the eight year long anti-Japanese War were the main events characterizing this part of Chinese history. Legal developments had to be limited against such turmoil background. However, the Republican Government (or Nationalist Government) did manage completing the so-called six Codes, including the Constitutional Code, the Civil Code, the Commercial Law Code, the Criminal Law Code, the Civil Procedure Code, and Criminal Procedure Code. The Government of the People's Republic of China denounced the legality of all these codes in 1949, but these codes continue to operate in Taiwan after 1949 because the Nationalist Government retreated to Taiwan with its political and legal establishments following its defeat in Mainland China by the Communist army.

3. Legal Transplants Since 1949

1) Influence of Soviet Law

After the Second World War, as an inevitable consequence of emerging as a Communist power. China joined the Soviet Block. The Civil law system established by the Republican Government in China between 1912 and 1949 had to be entirely destroyed together with everything else claimed by the Republican Government. But the newly established People's Government had neither expertise nor resources to develop its own legal system. Turning to the Soviet Republic for assistance was a natural option for developing its own legal system of new China. Legal transplant still continued in the new China, but the influence was from the Soviet law which was once regarded as one of the world's major legal families by scholars studying comparative law.

Since the establishment of the People's Republic of China, the new Government did try to build a new legal system of its own. In 1949, when the New China denounced all laws promulgated by the Government of the Republic of China (Nationalist Government), it published a constitutional document known as the Common Programs, which consisted of 60 provisions, to provide guiding principles for China's new political and economic system. In 1950 when the legislative, executive and judicial powers were not clearly divided in China, the Marriage Law of China was passed by the central Government, which was largely an administrative

authority. This was the first written law ever passed by the new Government of China. Choosing the Marriage Law as the first written law to pass is understandable, probably for three reasons: first, policy and value tendency in marriage matters was easy to determine because the new Government believed strongly that marriage between a man and a woman must be the basic social unit of the society; secondly, the technical requirements for drafting the Marriage Law to reflect the basic value of the society were fairly simply; and thirdly, China urgently needed social stability after so many years of internal and external wars and protection of the basic family structure would provide such stability. The first National People's Congress was held in 1954, which passed the first Chinese Constitution to replace the Common Program made in 1949. The 1950 Marriage Law and the 1954 Constitution remained to be the only Chinese written laws till 1978, when China opened its door to the outside world.

Although China had not managed to complete any code of private law by transplanting the Soviet law before it turned to Civil law tradition again in 1978, China did accept the Soviet influence in its published Constitution and in its preparation for drafting the Civil law code. Soviets legal experts were the only foreign legal advisors working in China in the 1950s. In fact, many well-known Chinese legal scholars today around age of eighty were educated in the Soviet Unions in their youth years, and their contributions to the development of Chinese law after 1978 have inevitably shown some marks of Soviet legal theory, or alternatively demonstrated some of the Soviet understanding of Civil law principles.

It is generally believed that the influence of Soviet law is seen in the present General Principles of Civil Law Code, which was passed in 1986. Different from the general divisions adopted in the French Civil Code (which is divided into three major parts, ie, law on person, law on property and law on obtainment of property) or German Civil Code (which is divided into five parts, ie, general principles, property, obligations, family and succession), the Chinese Civil Code has adopted a different approach to the regulation of civil activities and civil matter, including general principles, capacity, legal persons, civil acts and agency, civil rights, civil obligations, time limitation and private international law rules.

Accordingly, the prevailing views of Chinese civil law divide civil law issues into nine large groups, such as general principles, property, obligations, family, succession, intellectual property, personal rights, tort and private international law rules. Such variations in Chinese civil law may be considered to have reflected in some way the influence of Soviet law in the past years.¹⁵

Another evidence of Soviet law influence is the change in the Chinese views on property or proprietary rights. For a long time after 1949, there were only state and collective ownership in China. Thus, the Chinese understanding of ownership was very basic and Soviet like,¹⁶ excluding the right to possess, to benefit, to mortgage and to set security on the property, etc. This was because in the absence of wide private ownership in China, all these rights associated with or deriving from ownership were not meaningful, at least in law. All of these have changed after 1978. Now, not only the Chinese Constitution expressly protects private ownership in its Article 13. But also the Chinese Property Law came into effect in July 2007. The Chinese views on property have undertaken tremendous changes in past 30 years, but the Soviet influence on property law has been visible in the development of Chinese law after 1949.

In summary, it can be concluded that Soviet law did have some influence on Chinese law, in particular in the period between 1949 and 1977, when China did not have any other sources to turn to for legal transplantation. Although the legal development in China after 1978 has demonstrated some considerable influence from both the Civil law and Common law tradition upon Chinese law, the Soviet law as it stands in the 1950s has affected the development of Chinese law in 1950s and 1960s. Such influence will inevitably leaves some marks in the on-going process of shaping of Chinese law with Chinese characteristics in China, resulting in something unique in China known as legal culture.

¹⁵ Xiuqing Li, *Study of Chinese Transplant of Soviet Civil Law Model*, (2002) No. 5 Social Science of China, pp 126-141 (in Chinese).

¹⁶ *Ibid.*

2) Recent Legal Developments after 1978

China entered into a new era since 1978 when it official adopted the “open door” policy, symbolizing the commencement of still on-going economic reform. The economic reform has been very successful so far. With a continuation of high rate of growth in past 30 years, China is becoming the second largest economy by single country and became the number one exporting power by single country in the world in 2009.¹⁷ It is impossible for China to have achieved all of these without the support of an efficient, but yet imperfect, legal system. Therefore, it is necessary to read and understand the Chinese legal system in an objective and sympathetic way.

In 1978, when China began to rebuild its legal system, China had to start afresh. The legal developments achieved by the Nationalist Government (in Mainland China before 1949 and in Taiwan after 1949) had to be denounced totally because that was the only politically correct option for the People’s Government to take. The Soviet law model did not offer much assistance because not only China-Soviet relations had never been recovered since the breaking up in 1950s, but also the Soviet Union itself was facing political and economic crisis in 1970s. In 1978, the only known written laws in China were the 1975 Constitution, which succeeded the 1954 Constitution, and the 1950 Marriage Law. In balancing all likely choices and also taking into account the strong influence of the Chinese legal culture, whether acknowledged or not, which has affected the unconscious thinking of Chinese legal scholars in past 30 years, China again turned to Civil law tradition for assistance. But this time the Civil law model adopted in China has been influenced strongly by the Civil law model adopted by the early Nationalist Government in the first half of the 20th century and now practiced in Taiwan. Cultural connection and language convenience are the major reasons for the Chinese scholars and governmental experts, who did not possess sufficient knowledge of either Civil law in Europe or Common law in other Western

¹⁷ China’s export reached 1201 billion in US dollars and was the number one exporting country of the world in 2009. The information is available at <http://finance.sina.com.cn/j/20100209/20287397050.shtml>.

countries, to rely heavily on Taiwan's experiences in transplanting Civil law for the purpose of rebuilding a legal system in China.

Chinese legal system has developed rapidly since 1978. Now China has passed the General Principles of Civil Law, which is meant to be the first half of a comprehensive Civil Code yet to be accomplished, the Criminal Law Code, the Criminal Procedure Code, the Civil Procedure Code, the Contract Law, the Maritime Law, the Insurance Law and many other laws. It has been estimated that since 1978, nearly 400 pieces of laws and more than dozen of legal interpretations have been passed by the National People's Congress and its Standing Committee.¹⁸ In addition, more than 1000 administrative rules and regulations have been made by the State Council since 1978.¹⁹ The statistics along have suggested that a comprehensive legal system based mainly on written laws has been established in China in past 30 years.

IV. Convergence of Civil Law and Common Law since 1978

1. Civil Law Features in Chinese Private Law

Under the Civil law tradition, laws can be divided into two broad categories: public and private. The two terms, "public law" and "private law" lack uniform understandings, but the term "private law" is generally understood as referring mainly to a body of laws regulating personal rights, relations, and property. According to this general understanding, private law in China mainly refers to the laws of civil and commercial nature, such as the General Principles of Civil Code, the Contract Law, the Insurance Law, the Maritime Law, the Labor Contract Law, the Marriage Law, the Civil Procedure Code, and etc. Most Chinese laws fall under the category of private law, which is the major concern of this paper.

There are a number of reasons to explain why China has by definition transplanted the Civil law model. First, in 1978 when China began to rebuild its legal system, in view of Chinese legal

¹⁸ See news report on 25 September 2008 by Xinhua News Agency (in Chinese), available at http://news.ifeng.com/mainland/200809/0925_17_804940.shtml.

¹⁹ Ibid.

culture and tradition, legal scholars and law-makers unanimously agreed that China should establish a legal system by transplanting the Civil law models as those established in Germany, France, Japan and Chinese Taiwan. Secondly, codification of laws has taken place in China although China has not been able to produce the same-style codes as many Civil law tradition countries have done. Thirdly, the Chinese legal tradition and culture in 1978 had been developed on the basis of many Civil law legal concepts and principles, which have consequently not only affected the drafting of laws, but also judicial practices of the court. Lastly, the Chinese judiciary is largely Civil law style in terms of the judge's qualification, appointment and operation of the court. It must be pointed out, however, that the procuratorate in China is part of the judiciary, whose establishment is not only influenced by the Civil law tradition, but also by the Soviet practices concerning the procuratorate. Some of these reasons are further explained in the following paragraphs.

In terms of formality, the Chinese law is largely code-based. However, instead of adopting six or more general codes such as what has happened in Germany and Chinese Taiwan, China has completed only three basic codes, including the Criminal Law Code, the Criminal Procedure Code and Civil Procedure Code, and half of the Civil Code (the General Principles of Civil Law), whilst passing hundred of specific laws of civil and commercial nature as individual laws of their own rights. There could be a complex of reasons for this. For example, many codes in Civil law counties or jurisdictions are old and many principles are thus no longer suitable for transplanting in the modern Chinese society. Another possible reason is that Chinese cultural, political, social and economic backgrounds are different from many of the European Civil law countries, and therefore their laws cannot be transplanted directly in China. In addition, China is a transitional economy both economically and politically, and therefore, it must develop legal rules of its own to satisfy the special needs of such transitional economy. All of these reasons may explain one way or another why China has published many individual laws to provide solutions to its social and economic problems. However, such case-by-case approach to written legislation happens to be one of the essential features of Common law tradition practiced in many Common law

jurisdictions. Thus this is one of the instances where the present Chinese legal system has also been influenced by the Common law tradition.

There are many examples of basic Civil law principles guiding Chinese legal developments. The Property Law entering into force in 2007 is one of such examples. In this law, the concept of ownership or property, principles affecting acquisition of property, right to benefit, right of liens and etc are essentially from German law. In addition, the legal theories concerning obligations in China are also largely of German legal principles as we see in the German Civil Code, such as the nature or basis of contract, and unjustified profits. The same can also be said about a number of principles in the Chinese Contract Law concerning performance and termination of contract, which have been formulated in a Civil law manner.

The Chinese court is structured in a manner similar to courts in many Civil law jurisdictions. Judges are essentially governmental employees with some special status. They enjoy relatively wide judicial discretion in the interpretation and enforcement of law, and usually write short judgments without giving sufficient details of either the facts or their reasoning. Although the National Supreme Court and a number of Provincial Supreme Courts have on occasions attempted to improve the quality of the judgments and the basic skills of judgment writing, the efforts have not yielded any significant improvements so far. However, as a general tendency, the quality of judgments and reasoning appears to have improved a bit in recent years along with the improvement of the general quality of judges in China. This is particularly true in the judgments delivered by the National Supreme Court, which naturally represents the highest quality of Chinese judges. The simple and unreasoned judgment is not necessarily of a modern Civil law characteristic, given that Civil law judges in many traditional Civil law jurisdictions have begun to produce detailed and reasoned judgments in an effort to improve the transparency and consistency in law enforcement. However, the present problem in China is rather historical caused by a lack of training and skills in legal reasoning and relative poor quality of majority judges in interpreting laws. The situation will certainly be improved along with the capacity-building of judges in China.

In summary, China turned to Civil law tradition for developing its modern legal system about hundred years ago and the legal culture formed against such background led to the transplantation of Civil law again in 1978 when the present Chinese Government decided to rebuild its legal system to provide structural support for its efforts of modernization. Since 1978, the Civil law concepts, principles and practices have been the major influence in the development of Chinese legal system. This has been seen in the code system adopted in China, and the legal principles underlying many Chinese written law, as well as the judicial system and judicial practices in China. However, China has not turned into a real Civil law country because many of the specific laws passed to offer solutions to many economical, political, social, cultural and legal problems also bear influence of Common law tradition, suggesting a convergence of both Civil law and Common law in modern China.

2. Common Law Features in Chinese Private Law

When examining the issue of legal transplant, we have to turn to both the formality and substance of law for an answer. The foundation of Chinese law is Civil law. However, influence of Common law can be seen in a number of aspects of Chinese private law. For example, making of specific laws for specific issues is a Common law practices developed to supplement deficiency in the case law made by the court. China has adopted such practices in providing solutions to many problems in the absence of basic law codes. Similarly, many Common law principles can be seen in Chinese laws, such as contract law, consumer protection and product liability laws. Precedential effect of cases has also been emphasized by the National Supreme Court in a hope to reduce radical discrepancy and to ensure reasonable consistency in the exercise of discretionary interpretation power by the Chinese court in discharging its law enforcement function. Some of these features are to be discussed further in the following paragraphs.

First, in terms of legislative formality, China has wisely suspended the impossible task of codification in the private law areas, and chosen to follow the Common law practice of passing specific laws for specific issues. The fact that China has only

completed half of the Civil Law Code since 1986 and passed many specific laws or codes in the private law areas, which may otherwise be part of the Civil Law Code, is a good illustration of transplanting Common law practices in China to provide specific solutions to those specific problems which cannot be resolved by transplanting Civil law style codes in China. It is possible that sometime in the future when China has accumulated enough experiences in the regulation of various matters in the private law areas, it will incorporate all the relevant rules into one or two comprehensive law codes and thus to complete its journey of Civil law transplantation symbolically. However, it is also equally possible China will never consolidate everything into the Civil law style law codes in the private law areas because of the technical difficulties and costs in ensuring continuous uniformity and consistency in any comprehensive law codes in the private law areas, which are meant to provide efficient solutions to many fast-changing commercial and social practices that are often controversial and inter-connected. Codification of laws is challenging both jurisprudentially and technically. Given the variety and individuality of many practical and legal problems, whether codification of private laws is a perfect answer to the imperfect world we live in is doubtful. Accordingly, the author of this paper believes that whether the codification of private laws is a must in the development of Chinese legal system is an unsettled issue yet to be thoroughly debated and tested in China. There is nothing wrong if China adopts a modified Civil law system which can provide efficient, constructive and innovative solutions to unique problems faced by China in years to come. After all, formality of law-making is meaningful only if it can provide efficient and fair answers to practical issues.

Secondly, many Common law principles have been incorporated into Chinese law and practices. This can be seen specifically in the Chinese Contract Law which has borrowed ideas from Common law in regulating offer and acceptance, foreseeability and liability for damages, and certain rules concerning sale of goods contract, such as delivery and passing of property and risks, as well as installment delivery. Similarly, in the company law area, China has developed a system of independent director with its own characteristics, but the basic notion is of Common law nature.

In addition, the consumer and product liability law in China has been influenced strongly by Common law tort law principles concerning consumer protection. The most recent influence of Common law principles upon Chinese law can be seen in the Draft of Tort Liability, published in November 2009 for public comments. This Draft has formulated many rules by transplanting Common law tort law principles. For example, Article 6 of the Draft has adopted a fault-based liability, whilst Article 7 adopting a strict liability, both being practices of Common law. Chapter 4 of the Draft stipulates special categories, such as employer and employee relations, occupier's liability (administrator or manager of hotels, shopping centre, banks, train or bus stations, parks, entertainment venues and other public facilities), organizer of public event, kindergarten, schools and universities, where tort liabilities have been imposed. Other special categories, such as traffic accidents (Chapter 6), doctor and patient relations (Chapter 7), high risk activities (Chapter 9), owner or controller of animals (Chapter 10) and injuries caused by physical items (Chapter 11) are also regulated in the Draft. Producer's liability to consumers is restated clearly in Chapter 5. Many rules in the Draft have reflected the torts law rules developed in Common jurisdictions. However, it must also be pointed out that these Common law principles or practices have been modified, either consciously or unconsciously, according to the understanding of the drafting persons who are able to apply these principles only to the extent they consider to be adequate and correct. This is also how the law of China characteristic has been developed.

Thirdly, the notion of case law has been introduced into China with some modification reflecting Chinese understanding of case law. As a legal tradition of Civil law nature, the court and judge enjoy wide judicial discretion in the interpretation and application of written law, even though the official power of interpreting law lies in the hands of the Standing Committee of the National People's Congress. For many years, discrepancy and inconsistency in judicial practices has been an issue troubling the National Supreme Court, which appears to be powerless in a situation where local courts in different areas giving different or even conflicting interpretations or understandings on the same rule in a statute and no one has asked the National Supreme Court to

offer an opinion on the discrepancy.²⁰ Probably for the purpose of unifying as much as possible judicial interpretations in China, the National Supreme Court began to publish the *National Supreme Court Gazette* in 1985, which selects an average of 4-5 cases for each issue. The *Gazette* is so far the only official case reporter published regularly in China besides those cases reported by various courts in their official websites. Some of the cases in the *Gazette* are selected from decisions of lower courts. These cases are not law in the same sense as the case law in Common law jurisdictions, but the intention to give some guidance to uniformity and consistency to lower courts exercising judicial interpretation power is obvious in promoting these representative cases. A number of lower courts have also adopted similar practices in publishing representative cases as guidance or reference for late decisions.²¹ Besides these official efforts in developing a case law system in China, many case books have been published in China. However, most of these books serve as examples or illustrations for possible judicial interpretation of laws, and do not possess any binding force of case law as understood in Common law jurisdictions. Such use of cases in China may perhaps be considered to be one of the characteristics of Chinese cases law today.

These are the examples of transplanting Common law in the development of Chinese legal system today.

V. Conclusion: A Convergent Legal System of Chinese Characteristics

China has established a convergent legal system with its own characteristics. By definition, especially if we have to choose between the Civil law and Common law, China is largely a Civil law country. At least, this is how China started its journey of rebuilding its legal system after 1978. However, a simple legal transplant has

²⁰ For example, the author has studied judicial decisions concerning anonymous investors in China and found certain discrepancy in many court decisions concerning foreign investment law, contract law and company law. See John Shijian Mo, "Legal Problems Arising from Anonymous Investments by Taiwanese Investors" Volume 7:6 (2009) *Modern Law* 16-28 (in Chinese).

²¹ For example, see the official website of Jiangsu Provincial Supreme Court and the official website of Zhongyuan Basic Court of Zhengzhou Municipality.

proven to be impossible because of the unique features of China for what it is. Wisely China has not simply copied or transplanted any specific model of Civil law in China entirely. Instead it has modified, either successfully or unsuccessfully, many principles of Civil law according to its perceived political, economic, social and cultural values. Political consciousness or the political will to maintain the Chinese Socialistic characteristics is the true reason and power resisting unqualified transplant of Civil law, and thus pushing China towards a modified version of Civil law, which must be able to preserve the political values upheld by the Communist Party whilst offering motivation, protection and efficiency to the economic developments of China. So far, China has been rather successful at least as far as the economic development is concerned, in developing a modified model of Civil law.

As a result of resisting a total transplant of any existing model of Civil law, China must find feasible solutions to many practical problems unaddressed by the modified version of Civil law as being established in China. Turning to Common law for some feasible solutions is a logical option for China to take. This option has been reinforced by the training of many legal scholars in Common law jurisdictions, continuous legal exchanges between China and Common law jurisdictions and prevailing US influence both politically and economically. Consequently, many Common law principles and practices, which are able to offer solutions to Chinese problems, have found their way to settle comfortably or uncomfortably, often with some modification of Chinese characteristic, in a legal system which is presumably to be Civil law based. This is how convergence of Civil law and Common law has taken place in China.

No one knows how long China will maintain a convergent system of both the Civil law tradition and Common law tradition, although most people still believe that at some stage in the future, China shall incorporate many specific laws of private nature into the relevant codes, such as the Civil Code, Company Law Code, Commercial Law Code or Economic Law Code, if any. But the author of this paper maintains some doubt on the rationale and practicability of forcing specific laws into such large compartments of law known codes. Is the Civil law tradition or Common law tradition as we have seen today a religion or a solution-based

achievement of human intelligence and knowledge developed in different, but yet incidental, historical and cultural backgrounds? Even though we can argue endlessly about the nature of Civil law tradition or Common law tradition, one thing we are sure of is that the legal tradition is not religion. Therefore, we are only bound by the reasons and rationale that justifies the very existence as well as the substance of any legal model we call legal tradition. Accordingly, China is not bound to take any plastic surgery to its legal system merely for the purpose of making it look similar to the existing model of Civil law unless the codification of laws will result in a logical model what is more efficient, reasonable and friendly to the future developments of China. This is something yet to be determined in the future.

The author of this paper argues that China should develop a new model of legal system which is based convergent transplant of both Civil law and Common law in China. China has a unique history, unique culture and unique status in the world, and thus it needs a unique legal system of Chinese characteristics. At the age of globalization, many legal principles of Civil and Common law are compatible, and in fact both the Civil law tradition and the Common law tradition have learnt from and been influence by each other the past years. This is why often China could successfully incorporate Common law principles into its legal framework developed presumably on the basis of Civil law. China has also contributed to the globalization of law by creatively combining Civil law and Common law principles for the purpose of resolving practical problems arising from a transitional economy like China, whilst maintaining the political values which contradict in a number of ways to the Western domestic system where both the Civil law and Common law are originated. The author believes that if China can create a political model of Chinese characteristics, which is neither conventional Western democracy nor conventional Socialism, it can also create a legal model of its own characteristics, which is based on the convergence of both the Civil law and the Common law. The future success of the two models is closely related to and dependent upon each other. We need to keep an open mind on the possible success of a convergent model of Civil law and Common law in the future, although we have to overcome many theoretically and practical challenges arising from the

development of such model in the future, if such a convergent model will ever succeed.

PROFESSIONALISING LEGAL EDUCATION IN THE PEOPLE'S REPUBLIC OF CHINA

Zou Keyuan*

I. LEGAL EDUCATION IN CHINA – AN INTRODUCTION

Legal education is an indispensable link in the Chinese legal system, particularly when China has pledged to govern the country by the rule of law. Legal education is a necessary step for people working within the legal profession, training lawyers, judges, procurators, and other judicial personnel. Legal education, within the context of 21st Century China, has two main missions: first, facilitating the country's science and education (*kejiao xingguo*) drive and facilitating the rule of law in the country (*yifa zhiguo*). Without the development of legal education, the rule of law would be no more than an empty word.

Legal education can broadly include all forms of education related to law. For 16 years dating back to 1985, China has carried out its 'Popularizing Law Program'. This is designed to give ordinary people basic legal knowledge so as to raise their legal consciousness and to make them act under the law. Teams of lecturers from universities and other work units were formed to make lecture tours throughout the country.¹ Even the top Chinese government leaders invited law professors to provide seminars on current legal issues for the members of the Chinese Communist Party (CCP)'s Central Committee and the Standing Committee of the National People's Congress (NPC).²

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1 For example, in April 1993, the Senior Lecturers' Team for High Rank Officials to Learn Law was set up for leading cadres at various levels. The team consisted of law professors and legal officials above the bureau level. See Xu Yue & Yu Jie (eds.), *Twenty-Year Construction of China's Legal System* (Zhengzhou: Zhongzhou Old Books Publisher, 1998) (in Chinese), at 211. In 2000, a number of teachers in the China University of Political Science and Law conducted a so-called "ten thousand *li*" lecturing tour covering 100 cities and towns in 32 provinces. See Zhao Wei, "Propagandizing Laws to Innumerable Families in Every Corner of the Country", *Tribune of Political Science and Law* (in Chinese), No. 3, 2001, 154–155.

2 Since 1994, CCP has invited legal experts to *Zhongnanhai* to give seminars with more than 10 seminars being conducted. Since June 1999, the NPC Standing Committee

The 'fourth-five-year' law popularization program began in 2001 and the Ministry of Justice opened the website of law popularization in June that year as well.³ From 2001, the fourth of December has been designated 'Legal Publicity Day'.⁴ The success of these popularization activities depend on a formal legal education system and legal expertise that is inevitably linked to the legal profession itself.

The legal profession is composed not only of lawyers, judges and procurators, but also of legal educators such as law professors, notaries, and auxiliary staff members in legal profession such as law clerks and legal secretaries. Thus, the legal profession contains three types of legal personnel: practicing, academic and auxiliary.⁵ It is commonly understood that because of the close relationship between legal education and the legal profession, the latter should guide the development of the former, its training goals and main objectives. It should also play an important role in the content and methodology employed in teaching the law. This can be seen in the practices of other countries with a well-developed legal system.

Legal education composes three aspects: quality education, vocational education and continuing education. Quality education refers to the legal education undertaken in universities and colleges. Vocational education is a parallel form of legal education undertaken in judicial schools, police schools, and it is a so-called form of higher vocational education. Continuing education is directed towards training the judicial personnel at work, primarily carried out by the Judge's College or Procurator's College within the judicial system.⁶ However, there is no distinctive demarcation between these three aspects of legal education in China, which affects the healthy development of legal education. On the other hand, it should be noted that legal education transcends the instruction received at school.⁷

has held regular seminars on law and as of the end of 2001 there were 24 lectures given by legal experts.

3 For example, the Department of Law of the Central Committee of the Youth League, the Ministry of Justice, the Ministry of Education, etc., jointly decided in November 2001 to create "youths and teenagers law schools" to help them learn the law, understand the law, abide by the law and apply the law. Available in <http://www.legalinfo.gov.cn/joa/shifadongtai/sfddt091401.htm> (access date: 26 November 2001).

4 See "Legal Publicity Day puts focus on Constitution", *China Daily*, 5 December 2001; and Wang Bixue, "Strengthen the Constitutional Conception and Push Forward the Governing of the Country by Law – Interview of Zhang Fusheng, Minister of Justice", *People's Daily* (in Chinese), 3 December 2001, at 6.

5 See Huo Xiandan & Wang Hong, "The Establishment of the Unified National Judicial Examination System and the Reform of Legal Education", *Law Science Monthly* (in Chinese), No. 10, 2001, at 6.

6 See Liu Maolin, "Reflections of Certain Issues on National Judicial Examination and Legal Education Models", *Law Science Monthly* (in Chinese), No. 9, 2001, 26–27.

7 See *Black's Law Dictionary*, 6th Edition (St. Paul: West Pub., 1990), at 514.

Legal education was critically important for China during the era of reform, dating back to 1978. The market-oriented economic development has brought about a high degree of demand for sophisticated legal services. To meet this new demand, the Chinese government underscored the importance of having legal workers, particularly practicing lawyers, to provide a pool of legal experts who 'know law, know economics and know foreign languages' (*dong falu, dong jingji, dong waiyu*). A target was set to have 200,000 high quality practicing lawyers in China by 2010.⁸

II. REFORMING THE LEGAL EDUCATION AFTER THE ESTABLISHMENT OF THE PEOPLE'S REPUBLIC OF CHINA (1949)

A. *The CCP Agenda to Establish a Socialist-Based Legal Education System*

After the founding of the People's Republic of China (PRC) in 1949, the Chinese Communist Party attempted to reform the existing system of legal education with a socialist model which was largely based on the Soviet Union model.⁹ The judicial personnel left over from the old Kuomintang regime were not trusted by the CCP and their loyalty was suspect, after the Communists abolished the old judicial system.¹⁰ These personnel needed to be replaced. To transform the judicial system to serve its own interest (since the judiciary, in the eyes of the communists, is an important instrument of the People's Democratic Dictatorship), the CCP launched a nation-wide judicial reform movement in the early 1950s, which aimed to 'insure the political reliability of court personnel and to solidify the foundation for "socialist legality."¹¹ As a result, many judges from the old regime were expelled from their positions and some were jailed.

8 As of 2001, there were a little over 100,000 lawyers, and the quota for qualified lawyers through the national bar examination in 2002 was 21,500, in <http://chinalawinfo.com/fzdt/xwnr.asp?id=1128> (access date: 3 January 2002). In order to maintain the quality of legal profession, the numeric growth of the practicing lawyers should be kept at the 7% level. See "Retrospect and Prospect, Legal Profession in China – A discussion with President Gao Zongze of All China Lawyers Association on the Report on the Development of Chinese Legal Profession", *China Law*, February 2001, at 59.

9 As stated, the Central Government articulated a guiding principle for the reform of legal education: to learn from the successful experience of the Soviet legal education and combine it with actual conditions of China. Han Depei & Stephen Kanter, "Legal Education in China", *American Journal of Comparative Law*, Vol. 32, 1984, at 545.

10 See James P. Brady, *Justice and Politics in People's China: Legal Order or Continuing Revolution?* (London: Academic Press, 1982), at 107.

11 Shao-chuan Leng, *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* (Dobbs Ferry, New York: Oceana Publications, Inc., 1967), at 39.

The judicial reform at that time was hailed as a victory in consolidating the socialist judicial organ at all levels, establishing communist ideology as guidelines for judicial work, and laying a solid foundation for the People's Democratic Dictatorship.¹² However, there was a vacuum in the judicial system which affected its normal operations after many of the former judges had been expelled. As an expedient measure, communist cadres were brought into judicial work to fill the vacancies. Meanwhile, the CCP realized that this could not serve its long-term purposes. Thus, it was necessary to establish its own legal education system.

The legal education system was established in China through incorporation into the higher education system. In August 1949, the CCP Central Committee approved the establishment of the University of Political Sciences and Law (*zhengfa daxue*), and appointed Xie Juezai as the President. The students were drawn from three sources: cadres, judicial personnel who served the Kuomintang regime and needed to be retrained and reformed, and young students directly from high schools.¹³ During the period of reforming higher education in 1952, some old law schools were either abolished (like Soochow [*Dongwu*]) or combined to form new institutions. Four colleges of political sciences and law (*zhengfa xueyuan*) were then officially established: Beijing, Southwest, East China (*huadong*), and Central Southern China (*zhongnan*). At the same time, law departments were established in six universities including Peking University, People's University, Fudan University, Wuhan University, Northwestern University, and North China University (now Jilin University). According to the CCP strategy, the political-legal colleges cultivated judicial personnel and the law departments in universities produced legal researchers. The period of study was five years in the university and four years for law college.

In 1954, a national conference on political-legal education was held and in September that year, the Ministry of Education prepared a programme for the teaching of law, prescribing a four-year period of schooling and a curriculum of 29 courses including theoretical, basic, and specialized subjects.¹⁴ By 1956, there were 800 law teachers and 7,000 law students, and the legal education system had an annual intake of 2,000 students.¹⁵

12 See Shih Liang, "Achievements in the People's Judicial Work during the Past Three Years", *People's Daily* (in Chinese), 23 September 1952.

13 Xiao Yisun (ed.), *Fifty Years' Construction of the Legal System in the Republic* (Beijing: CCP Central Committee's Party School Press, 2000) (in Chinese), at 224.

14 Han & Kanter, *supra* note 9, at 548.

15 See Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1992), at 146.

B. *The Anti-Rightist Backlash and the Stalling of Legal Education Developments*

Nevertheless, the development of legal education was halted during the period of anti-rightist movement beginning in 1957. The spread of legal nihilism, of despising the law, caused the downfall of legal education. Many law professors were labeled as rightists and were deprived of their teaching rights.¹⁶ The situation was worsened during the Cultural Revolution (1966–1976). The law departments of all universities were closed down with the exception of Peking University and Jilin University, which were nominally retained without normal educational functions. It was not until 1973 that Peking University began to recruit law students and in the following year Jilin University followed suit. However, the number of law students throughout the country had declined to 269 by 1975.¹⁷

C. *The End of the Cultural Revolution and a Revived Pace of Legal Education Development*

The smashing of the Gang of Four and the end of the Cultural Revolution ushered in a new era for legal education in China. Most of the law departments began to recruit students in 1977. In 1983, the Ministry of Education approved the establishment of law departments in more than 30 universities. In December that year, a national conference on legal education was held in Beijing to set forth the programme for developing legal education for the 1980s, making the recommendation to achieve the goal of enrolling up to 10,000 law students by the end of 1987. As of 1990, undergraduates in law numbered 35,000 and postgraduates 2,250.¹⁸ Legal education in the 1990s experienced rapid development and law became a popular subject to major in, in the universities.

Some scholars divide legal education since the economic reform into two periods taking the year of 1993 as a benchmark. The main task of the first period before 1993 was to train 'both red and expert' (*you hong you zhuan*) judicial talents for judicial departments. The second period after 1993 has aimed at nurturing specialised talents who know

16 For example, Wang Tieya in Peking University. He later became President of the Chinese Society of International Law and Judge of the International Criminal Tribunal for the Former Yugoslavia. For details, see Han & Kanter, *supra* note 9, 549–552.

17 Gan Jihua, "Achievements and Reform of Legal Education", in Guo Daohui (ed.), *Essays on the Legal System in the Last Ten Years* (Beijing: Law Press, 1991) (in Chinese), at 427.

18 Xiao, *supra* note 13, at 225.

law, economics and foreign languages, to propel the development of the market economy and the legal construction of the rule of law.¹⁹

According to the statistics publicised in 1999 by the Ministry of Justice, there were 214 universities which had law faculties.²⁰ Among them, five are directly subordinated to the Ministry of Justice. This Ministry also has two cadre training colleges: Central Political-Legal College for Management Cadres, and the Central Educational College for Judicial and Police Officers. Postgraduate legal programs were also launched in universities. As of 1999, there were 43 universities which could grant LLM degrees and 10 universities accredited to grant doctoral degrees.²¹ In the late 1980s, the Ministry of Justice began to run the China National Lawyers' Learning through Correspondence Center, a form of distance legal education.

III. PROFESSIONAL LEGAL QUALIFICATIONS

Professional legal qualifications are prerequisites for persons to become lawyers, judges, prosecutors, and other judicial personnel (para-legals). In accordance with the Judge's Law, which was first adopted in 1995 and amended in 2000, general qualifications for judges include: (1) to be of Chinese nationality; (2) to have reached the age of 23; (3) to endorse the Chinese Constitution; (4) to have a fine political and professional quality and to be good in conduct; and (5) to be in good health.²² The same qualifications apply to procurators under the Procurator's Law.²³

The professional qualifications, particularly the requirement of academic degrees and work experiences have been heightened in both of the amended Laws: to become a judge, for LLB graduates or non-law graduates with a bachelor degree but possessing professional knowledge of law, candidates must have worked in the legal field for two years.²⁴ For those who will work at a Higher Court or the Supreme Court, three years of legal working experiences is required. For those graduates with masters or PhD degrees, one year working experience is required.²⁵ Another important revision in both Laws is that from

19 Liu Maolin, *supra* note 6, at 26.

20 Xiao, *supra* note 13, at 225.

21 See Xiao, *ibid.*, at 225.

22 Art.9 of the Judge' Law. The English version of the 1995 Judge' Law is available in Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997), 292-302.

23 Art. 10 of the Procurator's Law. The English version of the 1995 Procurator's Law is available in Brown, *ibid.*, 313-322.

24 In the 1995 Laws, it was only one year.

25 There is no such requirement in the 1995 Laws.

1st January 2002, judges and procurators must at least hold bachelor degrees. In addition, entry-level judges and procurators will be selected from those who not only meet the above requirements, but also have passed the National Judicial Examination.²⁶

The exception is only applicable to the minority regions where the quality of judicial personnel is lower than other regions in China. As a special consideration, the 2000 amended Laws allows those regions which have difficulties in implementing the above professional requirements to appoint, subject to examination and determination by the Supreme Court, judges and procurators with three-year training certificates (*da zhuan*) in law from colleges or universities within a certain time limit.²⁷

Current judges and procurators who do not hold bachelors degrees must receive training so as to meet the above qualifications. As to the training, the Supreme Court and the Supreme Procuratorate will lay down detailed requirements. However, the two amended Laws do not mention whether unqualified judges and procurators will be dismissed when they are unable to meet the requirements even after the training, nor specify a time limit for the completion of legal training.

The qualifications for lawyers are stipulated in the 1996 Lawyer's Law. The term "lawyer", according to this Law, means a practitioner who has acquired a lawyer's practice certificate and provides legal services to the public.²⁸ Before the person obtains a practice certificate, he or she needs to pass the national bar examination for qualification to be a lawyer. More importantly, a person who wishes to obtain the lawyer's qualification should have acquired a four-year period of legal training in an institution of higher learning, or attained an equivalent professional level, or acquired an undergraduate education in another major in an institution of higher learning, having passed the bar examination.²⁹

It is much easier for law graduates to pass the bar examination than graduates majoring in other fields, such as economics or political sciences. Non-law graduates wanting to sit for the examination need to study the legal textbooks first for necessary preparations. In this sense, they acquire legal knowledge from various means, such as training courses run by institutions of higher learning, or correspondence learning, or self-study, even if they do not receive a normal or typical

26 See Art. 12 of the Judge's Law and Art. 13 of the Procurator's Law.

27 Art. 9(6) of the 200 Judge's Law and Art. 10(6) of the 2000 Procurator's Law. Texts in *People's Daily* (in Chinese), 6 July 2001, at 6, and 11 July 2001, at 11.

28 Art. 2 of the Lawyer's Law. English version of this Law is annexed to Brown, *supra* note 22, 335–342.

29 See Art. 6 of the Lawyer's Law. Originally, requirement for legal education was three years.

form of legal education. In every event, legal education is a necessarily qualification for becoming a lawyer.

The requirements for legal education have been made more stringent in the new amendment adopted on 29 December 2001, from three years (*da zhuan*) to four years (*ben ke*).³⁰ This revision is consistent with the amended Judge's Law and Procurator's Law. The Ministry of Justice recently required the practicing lawyers and notaries who do not have bachelor's degree must obtain such a degree within five years from 2002.³¹ The Supreme People's Procuratorate demanded that all the procuratorates in the country train in-service prosecutors to reach the educational qualification level prescribed in the Prosecutors' Law. There will be about 60% of the total in-service prosecutors needing such training.³²

The amendment of the two laws on judicial personnel has heightened their professional requirements. It is interesting to note that the requirements for judges and procurators are now higher than those for lawyers. Previously, lawyers must sit for a bar examination to get the qualification, but judges and procurators could be appointed from retired military servicemen. But now, a person who wishes to be a judge or procurator must pass the National Judicial Examination and have a certain number of years of legal working experiences, while there is no working experience requirement for the qualification of a lawyer. According to the explanation of the Chinese authorities on the National Judicial Examination, those who have held the lawyer's certificate can continue their legal services as practicing lawyers, but when they wish to work at the judiciary, they must sit for the new examination.³³ Clearly, since 2002, the ability to attain a judgeship or procuratorship is more difficult.³⁴ The

30 "Decision on the Revision of the Lawyer's Law of the Standing Committee of the National People's Congress", 29 December 2001, available in <http://www.peopledaily.com.cn/GB/shehui/43/20011229/638483.html> (access date: 2 January 2002).

31 "Ministry of Justice urge a training for legal talents", *Mingpao* (in Chinese), available in <http://www.mingpaonews.com/20011224/caflr.htm> (access date: 24 December 2001).

32 "Supreme Procuratorate demands prosecutors to carry on the qualification training through a teleconference", *People's Daily* (in Chinese), 11 December 2001, at 6.

33 "Answers to certain questions related to the National Judicial Examination", in <http://www.legalinfo.gov.cn/news/news111208.htm> (access date: 26 December 2001).

34 Some measures on legal education requirements have been already taken in practice. For example, a recent selection of judges in Beijing Municipality proved that the educational level of the judges has been raised: among 252 presiding judges and 329 sole judges selected, one has a PhD, 25 have Master's degrees, 307 have Bachelor's degrees and 215 are junior college graduates. See "New selection process to improve judicial system", *China Daily*, 31 March 2001.

further tightening of the professional qualifications for judicial personnel presents new challenges and more tasks to institutions of legal education.

IV. THE SCHOOLING OF LAWYERS

The system of legal education in China is more complicated than the one in the Western countries such as the United States as it is fragmented into various components. While most of the law schools are part of universities under the purview of the Ministry of Education, some of the specialized universities and colleges in law and political sciences are managed directly by other ministries, such as the Ministry of Justice or the Ministry of Public Security. Recently, the Supreme People's Court and the Supreme People's Procuratorate set up their own training colleges. In addition, there is a self-study network run by the Chinese Law Society throughout the country. These form the four channels of the Chinese system of legal education.

Legal education is generally governed by the Ministry of Education which includes the Department of Higher Education; under it is the Division of Management of Financial, Economic, Political Science and Legal Education, an organ directly for the development of legal education. This Division is authorized to manage the work on legal education, to prepare development strategies and to guide the formulation of teaching documents, to enhance the relationship between legal education and society, and to evaluate and improve the pedagogy of legal teaching and the building-up of designated teaching sites.³⁵

Since legal education is unique and professional, it is difficult for the Ministry of Education to handle it alone. It needs assistance from the Ministry of Justice which has the Department of Law and Education, to help guide legal education and research in general, and teaching and research in the Ministry-subordinated law colleges and training centres in particular.³⁶ It is not clear, however, how the two ministries coordinate with each other to guide legal education. It seems that the Ministry of Justice is more concerned about the legal education development in the colleges and other educational institutions rather than law schools in universities under the Ministry of Education. Despite this, legal textbooks are prepared under the charge of the Ministry of Justice in accordance with guiding opinions

³⁵ See "Main Functions and Responsibilities of the Department of Higher Education", Ministry of Education, available in http://www.moe.edu.cn/highedu/glbm_1.htm (access date: 26 December 2001).

³⁶ See "Department of Law and Education", Ministry of Justice, available in <http://www.legalinfo.gov.cn/joa/apparment/aptfgyjy.htm> (access date: 26 December 2001).

of the Ministry of Education on the construction and reform of higher education teaching materials. The textbooks prepared under the Ministry of Justice are the most authoritative in China.

The mission of a law school is critical to the development of the legal profession and China's legal system. Every law school in the United States has a mission statement. For instance, the mission statement of the Northwestern University School of Law is 'to lead in advancing the understanding of law and legal institutions, for furthering justice under the rule of law, and in preparing students for productive leadership, professional success and personal fulfillment in a complex and changing world.'³⁷

The general mission of legal education in China is different from the United States in the sense that China is still a communist country and thus legal education must follow some ideological doctrine. Accordingly, its mission is 'to train students through higher legal education to become people who possess basic knowledge of the Marxist-Leninist theory of law; are familiar with the Party's political and legal work, policies and guiding principles; are endowed with socialist political consciousness; have mastered the professional knowledge of law; and are capable of undertaking research, teaching and practical legal work'.³⁸ However, after Deng Xiaoping's trip to South China in 1992, China has been heading towards the market economy, thus diminishing the influence of communist ideology. Consequently, the mission of legal education has become more pragmatic in the sense of serving the development of the market economy. For example, the recent mission statement of the Peking University Law School does not contain such communist ideological jargons, such as 'Marxist-Leninist', 'socialist', and 'Party' any longer. It simply aims to train students to master basic knowledge of law and capabilities of applying law to deal with legal matters.³⁹

The basic curriculum for law students is generally the same across the country, which consists of general courses such as foreign languages, physical education, philosophy; basic courses, such as constitutional law, criminal law; and specialized courses such as international economic law. Some basic courses such as criminal law, civil law, constitutional law, are mandatory. Specialized courses are usually optional.

37 See Gordon T. Butler, "The Law School Mission Statement: A Survival Guide for the Twenty-First Century", *Journal of Legal Education*, Vol. 50(2), 2000, at 243.

38 See Han & Kanter, *supra* note 9, at 563.

39 See "LL.B Teaching Plan", Peking University Law School, in http://www.law.pku.edu.cn/index_item.asp?f_id=36 (access date: 22 November 2001).

However, different schools may have a different focus in their own curriculums. In Peking University, students need to fulfill a total of 150 points in mandatory courses (106 points),⁴⁰ optional courses (20 points),⁴¹ a thesis and intern practice within four years of schooling. After four years, they should possess a solid knowledge of legal theory and various laws, know the developments in legal theory and legislation, and acquire sufficient proficiency in a foreign language to read professional materials, having the skills to apply relevant legal knowledge and legal stipulations to deal with legal affairs, to resolve legal issues, and to have the capability and properties of doing legal education and research.⁴² According to the Peking University statistics, during the schooling year of 2000, there were 1821 law students, among them 866 for bachelor degrees, 720 for LLM, and 235 for PhD. Students for continuing education numbered 1,300.⁴³ There were altogether 388 graduates applying to work at governmental judicial organs, enterprises, law firms, and academics.

The Law School of Tsinghua University was restored in 1995 after it had been merged into Peking University in 1949 when the PRC was founded. Since it is relatively new in comparison with the Peking University Law School, it is relatively easier for it to introduce a

40 They include general mandatory courses (such as College English; Introduction to Mao Zedong Thought; Deng Xiaoping Theory; Principles of Marxist Philosophy; Principles of Marxist Economics; Contemporary World Economy and Politics; Sports; Computer Fundamentals and Application; and Military Theory), law school mandatory courses (such as Jurisprudence; Chinese Legal History; Constitutional Law; Administrative Law and Administrative Procedure; General Theory of Civil Law; General Theory of Criminal Law; Private International Law; Intellectual Property Law; Enterprise Law/Company Law; International Economic Law; General Theory of Commercial Law; International Law; Civil Procedure; Economic Law; Criminal Procedure; Introduction to Law; Law of Property; Law of Obligation; Introduction to Legal Method; and Advanced Mathematics).

41 They include Introduction to Logics; History of Western Legal Thought; History of Chinese Legal Thought; Foreign Legal History; Foreign Criminal Law; Legal Writing; Family and Succession Law; Criminology; Competition Law; Fiscal and Taxation Law; Financial and Banking Law; Labor and Social Security Law; Law of the Sea; Legal English; International Taxation Law; Maritime Law; International Law of Technology Transfer; Forensic Medicine; Judicial Psychiatry; Foreign Constitutional Law; Comparative Judicial Systems; Foreign Civil and Commercial Law; Law of Negotiable Instruments; Criminalistics; Studies of Legislation; Roman Law; Foreign Administrative Law; Insurance Law; Law of Criminal Enforcement; Science of Medical Legal Expertise; Legal Profession and Legal Ethics; Environmental Law; Introduction to Laws of Hong Kong, Macao and Taiwan; International Investment Law; Introduction to Anglo-American Law; Practice of Law; International Financial Law; Accounting and Audit Law; Foreign Procedural Law; International Air Law; Law of International Organisation; Sociology of Law; International Environmental Law; and International Human Rights Law.

42 See "Peking University Law School", available in http://www.law.pku.edu.cn/index_item.asp?f_id=36 (access date: 22 November 2001).

43 "Introduction to the Law School", available in <http://www.law.pku.edu.cn/display.asp?id=24> (access date: 12 November 2001).

more modern curriculum. The school grants LLB, LLM, and PhD (in Civil and Commercial Law) degrees. There are 15 compulsory and 17 optional courses for LLB law students.⁴⁴ In addition, students are required to undertake the so-called 'social practice' including Community Service, Legal Internship, Moot Court and other related activities. The moot court model is quite new in China and the Tsinghua Law School probably is the pioneer in this respect. Another form of legal education the Tsinghua Law School has introduced from the United States is clinical education through which students are trained to resolve practical legal issues/disputes by using what they have learnt in class. One of the characteristics of that school is the requirement for law students to learn some natural sciences courses such as Advanced Mathematics, Introduction to Physics, and Introduction to Modern Biology, for which Tsinghua University has the strongest capacity of schooling in the country.

Information technology opens the door for new forms of education, such as distance education conducted through the internet or other means. Some law schools have begun to use this facility to create distance legal education. Peking University Law School is a pioneer in this respect and has established a three-year program through the internet.⁴⁵

The legal education teaching method in China is very traditional, i.e., the most common pedagogical technique is lecturing, which is now criticised as being too conservative since it does not promote healthy skepticism, intellectual curiosity and creativity.⁴⁶ To remedy the weakness resulting from traditional teaching methods, some innovative Socratic methods including clinical education and moot court training have been recently introduced to China.

Clinical legal education refers to a method which adopts clinical techniques which facilitate the acquisition of skills and the development of a critical and contextual understanding of the law as it affects people in society, thus enhancing the achievement of intellectual

44 Compulsory ones include: Introduction to Law, Jurisprudence, Chinese Legal History, Constitutional Law, Administrative Law, Civil Law, Intellectual Property Law, Business Law, Economic Law, Criminal Law, Criminal Procedural Law, Civil Procedural Law, International Law, Private International Law, International Economic Law, and optional ones are Natural Resources and Environmental Protection Law, Tax law, Lawyering, Notary and Arbitration System, Maritime Law, Comparative Law, Foreign Legal History, Legal Logic, Legal Writings, History of Chinese Legal Thoughts, History of Western Legal Thoughts, Family Law and Succession Law, etc.

45 See "Peking University Legal Net Education Program", in <http://edu.chinalawinfo.com/education/jihua.php> (access date: 3 January 2002).

46 Richard A. Herman, "The Education of China's Lawyers", *Albany Law Review*, Vol. 46, 1982, at 804.

and educational goals.⁴⁷ As is stated, 'one of the characteristics of the clinical method is that leaning comes more from the process of undertaking an activity than from the product of that activity'.⁴⁸ In the United States, clinical courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all American Bar Association (ABA)-approved law schools.⁴⁹ This method was only introduced into China in 2000 with the financial support of the Ford Foundation. At present, seven law schools in China have established clinical courses. Tsinghua University Law School is one of them. It cooperated with the Consumers Protection Association of Beijing's Haidian District to open a 'legal clinic' through which students begin to learn and become familiar with laws and regulations concerning consumers protection and to learn how to deal with cases as lawyers do.⁵⁰ It has proved to be a good method not only to teach law students the knowledge of law, but also to train them to obtain skills, capacity, professional ethics, and how to apply law in practice, which could not be taught and obtained in a traditional class.

Moot court is designed to train students to learn the skills of advocacy. In the common law countries, it is a mandatory course for all junior law students. It has been recently introduced in China. The Tsinghua University Law School has organized two moot court competitions and sent students to participate in such competition at the international level.⁵¹ Mooting is related to the method of case teaching, i.e., the use of existing cases to explain relevant laws and legal doctrines. This is prevalent in common law countries, and many Chinese legal educators advocate its adoption.

While these new teaching methods have merit and are necessary to train students since the practicalities of law can only be acquired through practice, it should be noted that traditional teaching methods are still useful for indoctrinating in students the basic knowledge of law. Overemphasis of the practical teaching methods should be avoided.⁵² The new methods can be regarded as supplementary to

47 See Hugh Brayne, Nigel Duncan & Richard Grimes, *Clinical Legal Education: Active Learning in Your Law School* (London: Blackstone Press, 1998), at xiii.

48 Brayne, Duncan & Grimes, *ibid.*, at xii.

49 American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (Chicago: American Bar Association, 1992), at 6.

50 See Wang Chengguang & Chen Jianmin, "A Practical Law Teaching and the Reform of Legal Education", *Law Science Monthly* (in Chinese), No. 7, 2001, at 4.

51 See Wang & Chen, *ibid.*, 4–5.

52 Some Chinese legal scholars tend to overzealously emphasise the importance of the new methods and to belittle the importance of the traditional methods. See Wang & Chen, *ibid.*, 3–7. Even in the United States, law professors doubted the tendency of overemphasising practical teaching methods. See Richard Stith, "Can Practice Do

the traditional ones, both methods being central to a sound legal education.

Even if there are more practical courses in law schools, practicing experiences after graduation is still necessary. According to a senior American attorney and professor, for many young practicing lawyers, regardless of how long they have studied in law schools, 'they cannot succeed in becoming highly trained and effective lawyers without at least three to five years of actual legal practice experience'.⁵³

V. INTEGRATION OF LEGAL EDUCATION WITH LEGAL PROFESSION

It seems self-evident that universities and the profession should work together to offer the best training to those who intend to be lawyers, and that influencing each other would be mutually beneficial to both institutions.⁵⁴ However, it is commonly acknowledged that there is a gap between legal education and the legal profession, particularly in relation to legal practice, which is a global phenomenon. Law schools face the problem of how to train students who have the requisite knowledge of legal theory and practical skills so as to prepare them for the rapidly changing environment of legal profession (such as law firms) and the increased complexity of the law itself. According to a survey, many American law students regard legal research and writing skills, knowledge of substantive law (doctrine), practical skills training, and previous live client experience as important for a legal job, and students expect more practical training, practical skills, and increase research and writing opportunities at law schools.⁵⁵

One of the major differences the American law students identified between the classroom and the law firm was the level of tolerance for weak analysis and incorrect conclusions. Law firms cannot tolerate these because wrong responses had real consequences while law professors might find them interesting for pedagogical reasons. The other is that law school placed too much emphasis on advocating only one party's position, and more attention should be placed on consensus

Without Theory: Differing Answers in Western Legal Education", *Indiana International & Comparative Law Review*, Vol. 4(1), 1993, 1-14.

53 Robert F. Grondine, "An International Perspective on Japan's New Legal Education System", *Asian-Pacific Law & Policy Journal*, Vol. 2(2), 2001, at 4.

54 Claude Thomasset & René Laperrière, "Faculties under Influence: The Infeudation of Law Schools to the Legal Profession", in Fiona Cownie (ed.), *The Law School - Global Issues, Local Questions* (Dartmouth: Ashgate, 1999), at 191.

55 See Christine M. Szaj, "Building Bridges and Connecting Dots: Easing the Transition from Law Schools to Law Practice", in Donald B. King (ed.), *Legal Education in the 21st Century* (Littleton, Colorado: Fred B. Rothman Publications, 1999), 123-124.

building and other less-adversarial ways of treating one's opponent.⁵⁶ To bridge such a gap, American law schools have designed programs linking theory and practice. For example, the Law School of Saint Louis University created the Corporate Counsel Extern Program with attorneys from several corporate legal departments in the St. Louis metropolitan area, and through the Program students are assigned to work in corporate legal departments under the supervision of in-house counsels.⁵⁷

In China's case, the gap between legal education and legal profession is even wider. Although legal education has developed extensively in the last two decades, legal education and legal practice is still to a large extent separate. Legal education has not concerned itself very much with the needs and demands of the legal profession. Education programs are carried out under the purview of the Ministry of Education. The phenomenon of 'high scores and low capability' (*gao feng di neng*) graduates is prevalent.

Unlike in the United States where the American Bar Association plays a critical role in the development of the American legal education, specialized organizations in China are usually not involved in the development of legal education. The All China Lawyers Association was established in July 1986 and there is no provision in its constitution which relates to legal education.⁵⁸ The Chinese Law Society, which was established in 1982, is an association accommodating legal personnel from both the legal science circle and law practicing circle.⁵⁹ According to its constitution, it may be involved in legal education, nurturing talents in legal science and law. However, in reality, the Society itself is excluded from any decision-making process with respect to legal education which is largely monopolized by the Ministry of Education.

There are a number of adverse consequences resulting from such separation. It causes judicial corruption and judicial injustice. The poor quality of judges cannot guarantee the good quality of judicial decisions and instead would create more wrong and false files of cases (*yuan jia cuo an*). Second, it disrupts the uniformity and dignity of China's legal system. Due to the existence of various legal training institutions in different localities and also under different governmental management, there exist no unified legal training standards, thus

⁵⁶ Szaj, *ibid.*, at 124.

⁵⁷ Szaj, *ibid.*, at 127.

⁵⁸ Its constitution contains 15 functions of the Lawyers Association, such as organising and implementing works relating to the National Bar Examination, involved in legislation, but none is concerned with legal education.

⁵⁹ In China, the term "legal science circle" (*faxue jie*) refers to the academics and "law circle" (*falü jie*) refers to law practicing departments, including lawyers, judges, prosecutors, notaries, etc.

hampering the formulation of a common legal language in China.⁶⁰ For example, the judicial organs have their own training colleges which are different from law schools in universities.

Some measures have been suggested to address this issue. First, inviting part-time teachers from judicial departments to come teach in law schools. Second, establishing legal practicing bases for law schools. Third, the organization of law teachers to participate in State legal construction activities. Fourth, the creation of the "third class", inviting government officials, managers of enterprises to give law students lectures on political and economic developments.⁶¹ Based on the past experiences in China and successful models of management and guidance of legal education from abroad, the National Committee of Judicial Examination should set up a non-governmental steering committee on legal education, similar to the ABA in the United States for the legal profession.⁶²

The second deficiency in the legal education is the previous division of the legal talents into legal theoretical talents and legal practicing talents according to where law students graduated (from universities or law colleges) from. This practice is criticised as severing legal doctrine from legal practice and implies the non-recognition of "jurist-type" judicial personnel and the recognition that legal work can be done without formal legal raining.⁶³ As mentioned above, in the whole legal profession the quality of judges and procurators are poorer than that of practicing lawyers. In addition, under the current circumstances, graduates from law schools who are willing to work at the judiciary cannot be properly recruited by the court or the procuratorate, but ironically lay-offs from the government departments can work in the court.⁶⁴

It is obvious that this deficiency has come to the attention of the Chinese Government, and the Supreme Court, the Supreme Procuratorate and the Ministry of Justice jointly issued a circular to unify the judicial examination from 2002 for entry-level judges, procurators as well as for the qualification of lawyers.⁶⁵ The first such examination

60 See Wang Zhengmin, "On Legal Education and Legal Profession", *Chinese Legal Science* (in Chinese), No. 5, 1996, at 95.

61 See Ma Kechang & Luo Mingda, "Reform of Legal Education", in Guo Daohui (ed.), *Essays on the Legal System in the Last Ten Years* (Beijing: Law Press, 1991) (in Chinese), 435-436.

62 Huo & Wang, *supra* note 5, at 65.

63 See Hu Yuhong, "National Judicial Examination and the Transformation of Legal Education Models", *Law Science Monthly* (in Chinese), No. 9, 2001, at 22.

64 See "How China's Judiciary Faces the New Century", *Democracy and Legal System Monthly* (in Chinese), No. 2, 2000, at 80.

65 See *People's Daily* (in Chinese), 16 July 2001, at 2. "New selection process to improve judicial system", *China Daily*, 31 March 2001. The text of the 2001

was held in March 2002. It lasted two days and included four test papers covering the contents of legal theory, applied legal science, existing laws and regulations, legal practice and legal professional ethics.⁶⁶ This measure may improve the quality of judges and procurators. Though it is not clear why the examination for judges and procurators is combined with the bar examination for lawyers, unified professional training and requirements can better maintain judicial justice in a country. The entry standard for legal profession is linked to the extent to which the rule of law is observed. Higher standards of legal training are likely to promote greater adherence to and respect for the rule of law. The unified judicial examination will bring about a series of innovations and reforms in legal profession and judicial structure. For example, it will alter the mechanism for selecting judges. Previously, the appointment of judges and procurators was not subject to examinations. With the examination, the judicial entry system will become more stringent so that the quality of legal profession will accordingly be raised.

The requirement of the judicial examination also applies to notaries public. The Ministry of Justice recently issued a Notice that from 2002 onward, notaries should be recruited from those who have passed the National Judicial Examination.⁶⁷

It is significant that the examination itself has created an institutional link between legal education and the legal profession. The development of and demand from the legal profession decides and guides the development of legal education. The tasks of legal education vary over time. At the present time when China has determined to rule the country by law, legal education provides not only high quality jurists, but also legal personnel who are needed in all walks of life.⁶⁸ It is clear that developing and assisting the process of the national judicial examination will constitute an important task of legal education.

Nevertheless, while emphasis is placed on the integration of the legal education with legal profession, legal education should not incline itself too much to the demands of practice to the extent it neglects the consideration of the nature of legal education. The

Implementing Measures on National Judicial Examination (Trial), which was adopted on 31st October 2001, and took effect from 1st January 2002, is available in <http://www.peopledaily.com.cn/GB/shizheng/252/17/1865/20011031/594864.html> (access date: 26 December 2001).

⁶⁶ See "Legal pros to get uniform test", *China Daily*, 31 December 2001.

⁶⁷ "Ministry of Justice requires in-service notaries to pass the National Judicial Examination", in <http://www.peopledaily.com.cn/GB/shizheng/252/17/1865/20011212/625107.html> (access date: 26 December 2001).

⁶⁸ See Huo & Wang, *supra* note 5, at 6.

two must be well-balanced: on the one hand, legal education should develop its curriculum and teaching methods by considering legal professional requirements, and on the other, legal education itself should maintain its autonomous status as part of higher learning. Even in the United States, there is a complaint about the subordination of legal education to the demands of the legal profession and law professors form a community whose prime loyalty is towards their legal profession rather than to their university. The influence of the legal profession on legal education amounts to a multifaceted control over the curriculum, the faculty and the students at law schools. Some legal scholars called for a change to allow law schools to act as autonomous institutions.⁶⁹ The professional monopoly may have an adverse impact on legal education, which is a lesson China should take into account in considering the reform of legal education in China.

VI. UNFINISHED TASKS

In the United States, about 130,000 law students are involved each year with legal education, and the number of law school teachers has increased from approximately 2,000 full-time in the 1950s to more than 8,000 in the 1990s.⁷⁰ In comparison, China's number is low (see Tables 3, 4 and 5), and falls short of the actual need. At present, there are about 280,000 adjudicating personnel throughout the country, but the actual number of qualified judges is small.⁷¹ With the development of the market economy, the demand for legal workers will sharply increase, particularly after China's entry into the World Trade Organization (WTO).

As the number of trained legal professionals produced by law schools falls short of what society needs, other channels of legal education have been created. The procuratorate prepared a training program for procurators from 2001 to 2005. Accordingly, by the end of 2005, 90 per cent of the procurators should have college diplomas, of whom about 100 should have PhD and 4,000 master's degree, and 40 per cent bachelor's degree.⁷²

69 See Thomasset & Laperrière, *supra* note 54, at 195 and 217.

70 See "Preface", in King (ed.), *supra* note 55, at xiii. It is noted that there were altogether 16,000 professionals including full-time and part-time law teachers, deans, administrators, and librarians.

71 See Li Hanchang, "A Perspective of Judges' Quality and Training against the Background of Judicial System Reform", *Chinese Legal Science* (in Chinese), 2000, No. 1, 48-49.

72 "Five-Year Education and Training Programme for Procuratorate", *People's Daily* (in Chinese), 14 March 2001, at 6. The court also has its training programme for the year of 2001 to 2005, see Xiao Yang, "Work Report of the Supreme People's Court", *People's Daily* (in Chinese), 22 March 2001, at 2.

Table 1. Top Ten Majors for Hiring Requirements in China

Ranking	Government Organs	University	State-Owned Enterprises	Financial Institution	Foreign Enterprises	For Overseas Study
1	Law	English	Accountancy	International Finance	Accountancy	Chemistry
2	Economics	Physical Education	Computer Science	Banking	Computer Science	Computer Science
3	Criminal Investigation	Education	Mass Communications	Accountancy	Mechanical Automation	English
4	International Economic Law	Clinical Medicine	Architecture	Computer Technology	Mass Communications	Business/ Finance
5	English	Computer Science	Mechanical Design	Investment Analysis	English	Life Sciences
6	Accountancy	Compute Technology	Electric Engineering	Economic Law	Computer Science	Applied Physics
7	International Trade	Mass Communications	Electronics	Economics	International Finance	Economics
8	Public Administration	Architecture	Electrical Automation	Information Management	Electronics	Wireless Communications
9	Administrative Law	Sports Training	Electric Engineering	Insurance	Marketing	Information Technology
10	Medicine	Law	Industrial Automation	International Finance	Mechanical Design	Computer Science

Sources: Adapted from Ministry of Education, in <http://www.moe.edu.cn/employment/xinwen/5.htm> (access date: 29 November 2001).

Table 2. Law Firms and Lawyers in China, 1985–2000

Year	Law Firms	Lawyers	Organizations with Legal Advisors
1985	3,131	13,403	39,453
1990	3,716	34,379	111,899
1995	7,263	90,602	234,496
1999	9,144	111,433	238,576
2000	9,541	117,260	247,160

Sources: *China Statistical Yearbook*, 1986, 1996, and 2001.

Table 3. College Graduates by Field of Study in China, 1995 & 2000

Field of Study	1995	Percentage	2000	Percentage
Philosophy	2,117	0.33	775	0.15
Economics	80,981	12.70	78,205	15.77
Law	17,650	2.77	19,806	4
Education	35,234	5.53	17,939	3.61
Literature	92,928	14.58	53,826	10.86
History	16,794	2.63	6,755	1.36
Science	87,845	13.78	49,215	9.92
Engineering	228,922	35.91	212,905	42.95
Agriculture	27,856	4.37	19,154	3.86
Medicine	47,090	7.39	37,045	7.47
Total	637,417	100	495,624	100

Sources: Adapted from *China Statistical Yearbook*, 1996, and 2001.

Note: Students under the “Law” category also include those majoring in Political Science, International Relations, Public Administration, and Sociology.

The court has intensified its training programs by cooperating with the Law School of Peking University to administer an ‘online program’ to train judges in accordance with the qualifications set forth in the amended Judges’ Law.⁷³ The National Judges College under the Supreme Court, originally established in 1985 as a part-time professional institution, was converted to a full-time one in December 2001. Over the past 16 years, it enabled more than 170,000 in-service judges pursue a law degree.⁷⁴ With China’s entry into the WTO, it started to provide Chinese judges with a series of WTO-related training courses.⁷⁵

⁷³ See “To establish a professional judge team of high quality”, *People’s Daily* (in Chinese), 13 November 2001, at 6.

⁷⁴ Shao Zongwei, “Judges’ college goes pro”, *China Daily*, 29 December 2001.

⁷⁵ “Supreme court gets ready for WTO entry”, *China Daily*, 22 February 2000. The whole text is available in *Legal Daily* (in Chinese), 22 October 2001, at 4.

Table 4. College Graduates by Field of Study (2000)

Field of Study	Students Pursuing Bachelor Degrees	Students with Three-Year Education
Philosophy	775	141
Economics	78,205	81,094
Law	19,806	24,318
Education	17,939	24,113
Literature	53,826	93,171
History	6,755	6,906
Science	49,215	48,986
Engineering	212,905	141,386
Agriculture	19,154	11,216
Medicine	37,045	22,812
Total	495,624	454,143

Source: Adapted from *China Statistical Yearbook*, 2001, p. 654.

Note: Students under the "Law" category also include those majoring in political science, international relations, public administration, and sociology.

Table 5. College Teachers by Field of Study (2000)

Field of Study	Professors	Asso. Prof.	Lecturers	Assistants	Instructors
Philosophy	1,301	5,051	6,251	2,530	536
Economics	3,041	10,588	15,169	7,199	1,775
Law	1,003	3,642	5,752	2,875	825
Education	1,797	11,552	18,233	10,123	2,711
Literature	5,191	21,106	31,004	20,433	6,275
History	1,041	2,656	3,201	1,193	296
Science	8,660	26,955	26,500	13,253	3,536
Engineering	14,567	41,212	43,935	21,875	6,169
Agriculture	2,069	5,042	5,224	2,493	666
Medicine	5,004	11,016	11,338	7,116	1,792
Total	43,674	138,820	166,607	89,090	24,581

Source: Adapted from *China Statistical Yearbook*, 2001, p. 654.

Note: Students under the "Law" category also include those majoring in political science, international relations, public administration, and sociology.

Since legal profession is a popular attraction in China and the social status of legal workers has been raised in the reform era,⁷⁶ many universities are inclined to establish law faculties even though conditions

⁷⁶ This is manifested by the fact that law professors have been to *Zhongnanhai* and NPC Standing Committee to give law lectures to the top Chinese leaders.

are not ready for this endeavour, causing a decline in the quality of legal education in some cases. It may be recalled that during the late 19th century and early 20th century when modern legal education was first introduced to China, its scale was expanded too much such that its quality was compromised. The current development of legal education should draw a lesson from history.⁷⁷ Thus the maintenance of a high quality of legal education is another issue to be considered in the process of reform.

Some law schools have adopted certain related measures in addition to revising their teaching methods. First, law graduates have more freedom to seek a job by introducing the recruitment method of 'double-direction choice' (*shuang xiang xue ze*), i.e., both the employer and the graduate can choose each other. Formerly, the job assignment was controlled under the State plan. Second, some law schools, such as in Peking University, have abolished the long-standing division between so-called teaching and research sections (*jiao yan shi*), which was a reflection of the planned economy. It originated from the Soviet Union and became an administrative means. The more salient shortcoming was its limit of teachers' academic area, thus a teacher in the section of constitutional law could not teach criminal law, and *vice versa*.⁷⁸ Thirdly, many law textbooks and legal doctrines remain old. For example, a course on basic legal theory is still influenced by the ossified system of legal theory from law textbooks of the former Soviet Union.⁷⁹ Old textbooks should be updated without delay.

One of the characteristics in China's law schools is the establishment of law firms within the schools. This is a response to the development of China's economy and the lack of financial support for higher education. For example, the Peking University Law School has two law firms (named as *Tonghe* and *Yanyuan* respectively). The LuoJia Law Firm managed by the Wuhan University Law School mainly consists of core teachers of the law school and like other law firms, provides legal services for the society.⁸⁰ Superficially, this kind of legal activity looks like a reflection of the integration of legal education and legal profession, but in nature this is a commercial activity which definitely disrupts the normal operation and quality of legal education. There are two ways, therefore, to reform this: to de-link such law firms from

77 See Song Fangqing, "A Study on China's Modern Legal Education", *Chinese Legal Science* (in Chinese), 2001, No. 5, at 177.

78 See Wang Chenguang, "Puzzling Problems in Legal Education – A Survey from the Comparative Perspective", *Peking University Law Journal* (in Chinese), No. 2, 1993, at 73.

79 Ma & Luo, *supra* note 61, at 433.

80 See "LuoJia Law Firm", Wuhan University Law School, in http://fxy.edu.cn/jxjg_2/ljlssws.htm (access date: 3 January 2002).

their law schools so as to let them become normal law firms, or convert them into legal aid centers for the purpose of clinical education.

The other area which needs an urgent reform is the law-degree granting system. In China, law degrees are granted not only to law graduates, but also to students in political science, public administration, international relations and sociology. This practice seems very strange and awkward in the eye of foreigners, but it is a reflection of the planned economy institutional structure under which the decision on awarding degrees belongs to the Ministry of Education.

The reform of a system of legal education is not unusual and is an on-going process even in countries with well established legal systems. For instance, Japan, China's neighbor and also the biggest influencer of China's modern legal system, has begun reforming its system of legal education. According to the proposal put forward by the Japanese Judicial Reform Council, an 'American style' legal education will be introduced to Japan and it is regarded as a unique opportunity for lawyers, legal educators and law students.⁸¹ Whether China is bold enough to introduce the American style to China's legal education remains to be seen. However, certain American style teaching methods such as moot court and clinical education have already been borrowed by some Chinese law schools.

China has paid attention to the reform of legal education in other countries and organized an international conference on development and reform of legal education in Asia which was held in Beijing in December 2001. It hopes to learn successful experiences from other Asian countries so as to quicken its pace towards achieving the rule of law.⁸²

Despite significant achievements, there is still a long march ahead for the reform of China's legal education. As the reform of legal education is part of the overall education reform, the latter plays a critical role in the former. Although China is on the track of market economy, its educational system is a product of the abolished planned economy. The projects of establishing a university or a major in a university, the number of students in enrollment, the orientation of research are all controlled by the Ministry of Education. As noted, Chinese legal education is highly centralized in the sense that there is a series of textbooks administrated by the Ministry of Justice and written by law

81 For details, see Gerald Paul McAlinn, "Reforming the System of Legal Education: A Call for Bold Leadership and Self-Governance", *Asian-Pacific Law & Policy Journal*, Vol. 2(2), 2001, 15-27.

82 See "Forum on Development and Reform of Legal Education in the 21st century Asia was held", *People's Daily* (in Chinese), 17 December 2001, at 6.

professors pooled from major law schools.⁸³ Such a system is obviously not consistent with China's market-orientated environment. Under the market economy conditions, training of students in universities should meet the supply and demand requirement from the market in the society, and universities should have a certain degree of autonomy. Legal education is no exception.

What is more important is whether the Chinese government values education seriously. The state budget for education is usually low, and such lack of funding will undoubtedly jeopardize the quality of schooling. The matter may get more serious within the context of globalization and the information technology age. It is correctly emphasized that the new form of knowledge-based economy heightens the role of education such that the Chinese government should place higher priority on education, including legal education, in its development strategy.⁸⁴

83 Gao Tong, "A Comparison of Chinese and U.S. Legal Education", in King (ed.), *supra* note 55, at 376.

84 For example, in 1996 China spent 2.3% of its GNP on education. See John Wong & Liu Zhiqiang, "Education and Development: Experiences from East Asia", EAI Working Paper No.45, July 2000, 6-7.

Law and Economic Change in Traditional China: A Comparative Perspective¹

Debin Ma

Abstract

This article offers a critical review of recent literature on Chinese legal tradition and argues that some subtle but fundamental differences between the Western and Chinese legal traditions are highly relevant to our explanation of the economic divergence in the modern era. By elucidating the fundamental feature of traditional Chinese legal system within the framework of a disciplinary mode of administrative justice, this article highlights the contrasting growth patterns of legal professions and legal knowledge in China and Western Europe that would ultimately affect property rights, contract enforcement and ultimately long-term growth trajectories. The paper concludes with some preliminary analysis on the inter-linkages between the historical evolution of political institution and legal regimes.

Western law – its unique features of legal formalism and rule of law – as argued by Max Webster has laid the foundation of Western capitalism and the eventual of the West (Trubeck 1972). Crucial to the Western legal system is Weber's distinction between formal and substantive justice. Under formal justice, legal adjudication and process for all individual legal disputes are bound by a set of generalised and well-specified rules and procedures. Substantive justice, on the other hand, seeks the optimal realisation of maximal justice and equity in each individual case, often with

¹ I want to thank comments from and discussion with John Drobak, Tirthankar Roy, Billy So, Oliver Volckart, Patrick Wallis, Jan Luiten van Zanden.

due consideration to comprehensive factors, whether legal, moral, political or otherwise. Formal justice tends to produce legal outcomes that are predictable and calculable, even though such outcomes may often clash with the substantive postulates of religious, ethical or political expediency in any individual case. Weber believed that formal justice is unique to the European legal system, with its highly differentiated, specialized and autonomous professional legal class, independent from the political authority. Legal rules were consciously fashioned and rulemaking was relatively free of direct interference from religious influences and other sources of traditional values. Formal justice reduces the dependency of the individual upon the grace and power of the authorities, thus rendering it often repugnant to authoritarian powers and demagoguery. Above all, the rule of law born out of the Western legal tradition supplied what Weber termed as calculability and predictability, elements essential for explaining the rise of Western capitalism and its absence in other civilizations.²

The Weberian synthesis permeated the thinking of generation of sinologists on the Chinese legal tradition. John King Fairbank remarked that “the concept of law is one of the glories of Western civilization, but in Chinese, attitude toward all laws has been a despised term for more than two thousand years. This is because the legalist concept of law fell far short of the Roman. Whereas Western law has been conceived of as a human embodiment of some higher order of God or nature, the law of the legalists (in China) represented only the ruler’s fiat. China developed little

² Weber (1978), vol.II, p.812. Unger (1976) and Trubek (1972), p.721.

or no civil law to protect the citizen; law remained largely administrative and penal, something the people attempted to avoid as much as possible” (1960, p.84).

These sentiments on the relative “backwardness” of Chinese legal tradition have entered into summary form in a recent book by Chinese legal scholar, Zhang Zhongqiu. The Chinese legal tradition, according to him, originated in tribal wars, was collectivist, dominated by public law, oriented towards ethical value, singular and closed, encapsulated in official legal codes, founded on the rule by man, and aimed for the ideal of no litigation, as contrasted with Western law which originated in clan conflicts, was individualistic, dominated by private law, oriented towards religious value, plural and open, expounded by jurisprudence, founded on the rule of law and aimed for justice (2006). These broad-brush characterizations, while useful to certain degrees, border on simplistic stereotypes of different legal cultures which have become the target of criticism from recent waves of revisionist scholarships. Contrary to the traditional Weberian synthesis, these recent works on Chinese legal tradition have argued that the Qing imperial legal system, long regarded as the epitome of arbitrary justice, was in fact far more rule-bound and predicable in their upholding of private property rights and enforcement of private contracts that previously recognized (see Philip Huang 1996, Zelin, Ocko and Gardella 2004). Interestingly, this is in line with another separate but influential argument advanced by Kenneth Pomeranz in his influential book, “Great Divergence” that views the property rights or the freedom to contract in traditional China as no less secure or flexible than in Western

Europe. The implication of these lines of argument that the roots of economic divergence between China and Western Europe in the modern era needs to be sought in areas other than ideological and institutional factors.³

This article offers a critical review of recent literature on Chinese legal tradition and argues that while the recent revisionist literature make significant contribution to a lively and timely re-examination of traditional Chinese legal system, it overlooks some subtle but fundamental differences between the Western and Chinese legal traditions that are crucial to the origin of the economic divergence in the modern era. By elucidating the fundamental feature of traditional Chinese legal system within the framework of a disciplinary mode of administrative justice, this article highlights the contrasting growth patterns of legal professions and legal knowledge in China and Western Europe that would ultimately affect property rights, contract enforcement and ultimately long-term growth trajectories. The paper ends with some preliminary analysis on the inter-linkages between the historical evolution of political institution and legal regimes.

The rest of the article is divided into three sections followed by a conclusion. The first section reviews the major feature and the related debate on the nature of traditional Chinese legal system. The second section offers a comparative analysis on legal traditions between China and Western Europe. The third section offers some preliminary analysis

³ For a summary of the California school, see Ma 2004b. See Pomeranz (2000) on the flexibility of traditional Chinese factor markets. See Philip Huang, Zelin et al for these revisionist studies on traditional Chinese legal system

on the linkage between political institutions and legal regimes in China and Europe.

I. Law and Legal System in Traditional China: Issues and Debates

We start our review of the Chinese legal tradition with Thomas Stephens's useful classification of traditional Chinese legal regime as "disciplinary" versus "adjudicative" or "legal" in the West. A "disciplinary" legal regime is akin to a military tribunal system whose overriding interest is the sanctioning of deviant behaviour to ensure group solidarity and social order at large (p.6). We can trace this "disciplinary" element of traditional Chinese law to etymology. The Chinese word for law, "fa," (法) also means "punishment" (刑) (Liang 2002, p. 36, Su, p. 6). In fact, pre-modern Chinese legal text makes no distinction between punishment and military conquest (兵刑不分), a contrast to the Latin etymology of "law", "jus" which specifically denotes rights (Liang, 2002, p. 37-38).

In traditional Chinese law (as in Rome law), the emperor is the source of law. Traditional Chinese legal apparatus had been an integral part of the administrative system with bureaucracy within the hierarchy – from the county level to the emperor – acting as the arbiter in criminal cases. But there is a system of checks to ensure consistency. The Chinese penal code was highly elaborate and systematic. The compilation of China's first legal code dated to 629 in the Tang dynasty (revised and completed in 737), only a hundred years later than the

Justinian code (drafted in 529 and promulgated in 533). As pointed out by Japanese scholar, Shuzuo Shiga, almost all the court rulings on criminal cases were required to cite specific official penal codes and statutes as support. Legal decisions on criminal cases, depending on the severity of punishments, would need to be reviewed through the administrative hierarchy with capital punishment reviewed and approved by the emperor himself (Shiga et al p.9). Officials at the lower level would face punishment if their rulings were found to be mistaken after review.

Despite the elaboration and sophistication of this legal system, this is in the end a bureaucratic law designed for the officials to meter out punishments proportionate to the extent of criminal violations for the purpose of social control. The official legal codes were structurally organized along the six ministerial divisions under the imperial bureaucracy: government, revenue, ceremony, justice, military and works (Liang, 1996, p.128-9). “More than half of the provisions of the Qing code, as pointed out by William Jones, are devoted to the regulation of ‘the official activities of government officials’” (cited in Ocko and Gilmartin, p.60). The meticulous and sophisticated juridical review process is carried out top-down within the administrative hierarchy.

In the case that the emperor made decisions and rulings outside the purview of extant legal statutes or contravened existing codes, these decisions became new laws or sub-statutes to be used as legal basis for future cases (Shiga et al, pp.11-12). In fact, as emphasized by Shiga and Terada, as the formal legal codes changed little over the dynasties, the emperor’s legal decisions on individual cases formed the single most

important dynamic changes to China's formal legal system (Shiga et al pp. 120-121). Although there are no formal legal or constitutional constraints on the imperial power (except the informal ones such as the much talked about "mandate of heaven"), the emperors recognize the value of consistency, fairness and balance in the legal system (Ocko and Gilmartin, p.61). So a "disciplinary" mode of justice may not necessarily lead to complete arbitrariness.

As the fundamentally penal nature of Chinese legal codes render it un-amenable to dispute resolution of a commercial and civil nature, this led to the long-held view of a complete absence of Chinese civil and commercial law. However, new research reveals that the county magistrates, the lowest level bureaucrats, handled and ruled on a vast amount of legal disputes of civil and commercial nature that did not entail any corporal punishment. Is there an implicit or a functional civil and commercial law in traditional China?⁴

Shiga argues these county-level trials were something more akin to a process of 'didactic conciliation', a term he borrowed from the studies by Western scholars on the Tokugawa legal system in Japan. The decisions of the magistrates were not legal 'adjudications' as in the Western legal order. The magistrate's ruling was effective and a legal case was considered as resolved or terminated only to the point that both litigants consented to the settlement and made no further attempts for appeals. Although not common, Shiga did point to cases where a legal dispute

⁴ For the extent of average people utilising the county level civil trial system, see Susumu Fuma's article in Shiga *et al.* and also Huang (1996).

dragged on indefinitely when one of the litigating parties reneged – sometime repeatedly - and thus refused to fulfil his or her original commitment to the settlement. Thus, this kind of ruling lacked the kind of binding and terminal force as the legal adjudication in the modern sense

Shiga was also interested in the legal basis of magistrate's rulings and found that although invoking general ethical, social or legal norms, they rarely relied on or cited any specific codes, customs or precedents. In accordance with its intermediation characteristics, the magistrate's ruling showed less concern for the adoption of a reasonably uniform and consistent standard than the resolution of each individual case with full consideration to its own merits. Shiga made a general case that the magistrates often resorted to a combination of "situation, reason and law" (情, 理, 法) as tools of persuasion or threat where it becomes necessary (see Shiga et al 1998, Shiga 1996, 2002).

This can best be illustrated by a specific case used by Shiga:

A widow of over 70-years old, Mrs. Gao, living in 19th century Shandong province pawned land to her junior uncle and his two sons at 45,000 cash. Later, Mrs. Gao wanted her cousins to buy and take over the land by paying an additional 50,000 cash. The cousins refused and the disputes were taken to the court.

The magistrate started his ruling by declaring that the blood relations are far more important than money matters and the welfare of the old widow needs to be looked after by her extended family. As there is a local custom that usually sets the pawning price of land at half of the sale value of the land, the widow should ask for an additional 45,000 cash

rather than 50,000 from the cousins. The magistrate further advised that the uncle and his two sons could share in their payment to the widow. The dispute seemed to be resolved with both parties agreeing to the magistrate's settlement (Shiga et al, p. 56).

The specific case shows clearly that the magistrate's ruling goes far beyond narrow legal spheres. In fact, he was much more interested in influencing the outcome – rather than the rules - of the game by bringing about what he viewed a socially ethical and harmonious outcome at the expense of the original terms of the agreement. His ruling relied on the power of persuasion more than legal basis. Shiga's particular interest in this case comes from the fact this is one of the few that specifically cited a local custom. But clearly, as Shiga points out, the customs cited here was nowhere implicated as the legal basis of his ruling or a binding social rule. In fact, Shiga pointed out other cases where local customs were simply ignored or even condemned (Shiga et all, pp. 57-59).

The flexibility with which magistrates made their rulings is also confirmed by Mio Kishimoto's careful case study of land sales (2003). In many regions, sellers of land often requested post-sales compensation from their buyers especially following the rise of land prices after sale. This practise led to widespread abuse with sellers requesting compensation at amounts and duration far beyond the customary rule or the original terms of the agreement. Resorting to reasons of sickness, old age, hunger, bad harvest, and sometimes blatant extortion, some sellers turn this compensation request into annual affair (often around the Chinese New Year). In fact, as summarized by Kishimoto, there is a systematic tendency

for magistrates' rule to lean towards requesting the relatively wealthy land buyers to compensate the poor in spite of the original agreement. The fact that that law or legal rulings were often mobilized for redistributive purpose can be substantiated by the statement from one of China's legendary iconoclastic late-Ming bureaucrat海瑞 (Hairei): "When in doubt during a litigation, my ruling would rather err on the side of the poor than the rich, on the side of the weak than the powerful"⁵

These features have led scholars to question the fundamental meaning of courts and contracts in traditional China. Terada argued that the magistrate's court more often served as a forum to renegotiate a settlement to replace the old one based on the changed conditions. "Contract" in traditional China was merely a written proof of a mutual agreement which may or may not have power binding the future (Terada 2003, p.95). Others echoed that "...regardless of subject matter, contracts and "documents of understanding" were more social than legal in nature because they were rooted in and protected by the social relationship of the parties;" or alternatively put, "the surest guarantee of one's rights seems to have been their acknowledgement by the local community" (by Myron Cohn and Ann Osborne respectively, cited in Ocko and Gilmartin, p. 74). Ironically, the importance of social relation behind contracts partly explains the motivation for litigation at the Magistrates' court. People filed complaints to enforce a contract and settle a debt and

⁵ Cited in Li Qin, 2005, p. 47. Liang Ziping also argued that the magistrate would not hesitate to issue rulings that could result in the alteration or simplification of the original agreements between the litigant parties if this would help "quiet both parties" Liang 1996, pp.134-140.

so on, but getting a case accepted for hearing also made use of courts to intimidate, coerce, and to turn the balance of social power in favour of the litigants within the social networks. Parties to private agreements utilized formal litigation as a means to gain advantages in a power relationship over private agreements, a process more aptly termed as “litinegotiation” (Ocko and Gilmartin, p. 71). As emphasized by Terada, disputes over properties and contracts were in the end resolved or regulated through the interplay of social norms, power, compromise and rational recognition of long-term benefit and cost.⁶

This largely Weberian interpretation of traditional Chinese legal system met vigorous challenge from China specialists, Philip Huang. Huang’s interpretation of Qing archival legal cases of civil disputes led him to conclude that the rulings of magistrates were far from being arbitrary but rather, rooted in formal legal codes and seemed legally binding for most of the cases. However, as pointed out in a series of rebuttals by Shiga and Terada, Huang’s somewhat contentious finding hinges on a very specific methodology that he adopted. Although there was no evidence to show that the original rulings by the magistrates cited any legal statutes or local customs as their legal basis, Huang matched the contents of the ruling

⁶ See Shiga et al, pp.191-279. One such case in point is recorded by a recent study of the commercial disputes in the highly commercialized Huzhou region of Anhui province in Ming and Qing. According to Han Xouyao, a serious and protracted land dispute between two large lineages in the area broke out and lasted across generation for a total of 128 years (from 1423 to 1551), and saw numerous trials and rulings by the county and prefecture courts and incidences of violent conflicts. In spite of the official ruling from the prefecture court, the disputes only ended with the drafting of a “truce” agreement signed by the two lineages and witnessed by middle men and village elder (pp. 93-117).

with the what he deemed as the relevant codes in the formal Qing legal penal code (Shiga 1996 and Terada 1995).

While there is much to be desired about Huang's methodology of inserting legal codes ex post to back up legal rulings made by magistrates several centuries earlier, the idea that magistrates ruled by some general moral and legal concepts and principles embedded in formal codes does merit attention.⁷ In fact, Huang's criticism of Shiga thus framed actually takes him close to the original position of Shiga who explicitly stated that magistrate's ruling appealed to a wide set of moral and ethical values most of which could be embedded in formal penal codes. If so, are the legal traditions indeed as divergent as Weber may have made out to be? After all, Western legal rules also partly formed through the codification of local customs and norms which may be reflective of general ethical and moral values. In particular, the English Common law system exemplifies such a process of law-finding and law-making based on the incorporation of principles embedded in customs and norms.

II. Convergent or Divergent Legal Traditions?

To appreciate the often subtle yet fundamental differences between the Chinese and Western legal traditions, we need to incorporate a much more systematic and historic perspective. It is useful for us to start with Harold Berman's following characterization of the fundamental features of

⁷ Zelin's argument on strong property rights and contract enforcement is also based on the fact that Qing's formal criminal code contains statutes relevant for civil and commercial matters. see Zelin 2004, p.19-23.

Western legal tradition which can be traced back to the Papal Revolution of the Middle Ages, the starting point of the political separation between church and state and political fragmentation:

- There is a sharp distinction between legal institutions and other types of institutions. Custom, in the sense of habitual patterns of behaviour, is distinguished from customary law, in the sense of customary norms of behaviour that are legally binding;
- The administration of legal institution is entrusted to a special corps of people, who engage in legal activities on a professional basis;
- The legal professionals are trained in a discrete body of higher learning identified as legal learning, with its own professional literature and in its own professional schools.
- There is a separate legal science, or a meta-law. Law includes not only legal institutions, legal commands, legal decisions and the like but also what legal scholars say about them;
- Law has a capacity to grow and the growth of law has an internal logic;
- The historicity of law is linked with the concept of its supremacy over the political authorities. The rulers (or the law-makers) are bound by it;
- Legal pluralism – the co-existence and competition within the same community of diverse jurisdictions and diverse legal systems – is most distinctive characteristics of the Western legal tradition (Harold Berman 1983, p. 7-8).

Although formal law especially in commercial affairs evolved slowly in the West partly because commercial disputes tended to be highly specialized and formal legal litigation and enforcement extremely costly, there occurred an evolution that led to the rise of an increasingly unified consistent body of laws based on the compilation of variously urban laws, guilds laws, in particular the well-known merchant law (*lex mercatorie*) centred in major trading centres under autonomous local government or independent city-states. The modern civil law in many ways formed through the amalgamation and standardization of traditional customary laws and commercial practices in different territories of jurisdiction. Major intellectual and political revolutions such as the Reformation and the Enlightenment movement, particularly the rise of modern nation-states became a major force that propelled the formation of modern Civil Law.⁸

The most illustrative case of this bottom-up process of legal growth is the historical development of the English legal system as a system distinct from the Continental civil law regime. As noted by Maitland, what allowed the English case-law system to develop, was not just the Parliament or the jury system - as the former was widespread in Europe and the latter originated in France - but the rise of a professional legal guild of lawyers and judges organized under the system of inns of court and chancery and their related training methods based on the study of legal case reports (Li 2003, p.20). Originating in the Medieval era, the inns of court grew from a training institution to become the equivalent of a law

⁸ See Berman 1983 for detailed description of this evolutionary process. See Grief 2006, chapter 10 for the evolution of impartial law in Medieval Europe.

school which by the Tudor times would be termed as the third University of England (outside Cambridge and Oxford) (J.H.Baker 2002, p. 161). Within this legal profession nurtured an independent jurisprudence that fostered the rise of an English legal tradition based on the commentaries and analysis of legal cases.

More importantly, with the Royal judiciary appointments being selected from among the most prominent members of this legal profession, the seeds of judiciary independent from political control had been sown. It was through the growing independence of an English judiciary, largely resolved through the political wrangling of the seventeenth century that laid the foundation for what was to become the hallmark of an English constitutional tradition rooted in the rule of law (J.H. Baker 2002, pp. 166-8, Li, chapter 6). The rise of an autonomous legal profession allowed the development of legal rule and procedure based a professional standard relatively free from extra-legal influences and thus ensured a sufficient degree of consistency and predictability in legal outcomes based on the case-law methods even before the establishment of the strict doctrine of binding precedents by the nineteenth century (Duxbury, chapter 2). Or as Weber put it in the characteristically Weberian jargon: “while not rational this (common) law was calculable, and it made extensive contractual autonomy possible” (Weber 1951, p. 102).

The evolution of the Chinese legal regime presents a sharp contrast to the overtime professionalization in the West. Not only did the entire legal system continue to be a part of the administrative organ of the state, but also, as Shiga aptly put it, all parties involved in dispute resolution in

traditional China, ranging from magistrates, third-party witnesses to guarantors and contracting parties remained distinctively “layman” like (Shiga 2002, chapters 4 and 5). The in-depth research by Chiu Pengsheng (2004) offers a vivid portrayal of a magistrate’s court in action during Ming and Qing China. The court session was open to the public, often thronged with various onlookers sometimes unrelated to any parties of the litigation. With an official qualification based on his success in a state examination system inculcated in Confucian classics, and appointed under a three-year country-wide rotating system of bureaucratic posting, the magistrate was often ill-prepared both in legal expertise and in local knowledge of the county he was serving. As a magistrate could face demotion or even physical punishment when his legal decisions were reviewed to be mistaken by the upper level administrative hierarchy or if the discontent litigants appealed to his superior (an extremely costly process) against his rulings, the effectiveness of his ruling to satisfy the review from the above and resolve disputes between litigants became important.⁹

As a result, most magistrates came to rely heavily on the legal assistance of the so-called 幕友, the private legal secretaries hired at their “personal” expenses. These legal secretaries were not allowed to be physically present at the court and thus operated from behind the scene based entirely on the written documentation. The magistrates’ dependence on their personal legal secretaries also induced the rise of a

⁹ See Ocko 1988 for the appeals procedure. For the very high costs of litigation at magistrate’s court, see Deng Jianpeng, chapter 2.

profession equivalent to what would have been lawyers in the West, the so-called “litigation masters or pettifoggers” (讼师), who used their legal expertise to assist the litigating parties in legal proceedings. While these factors pushed for professionalization in the West, they took a different turn in the Chinese political context of a dominant state bureaucracy. As their legal assistance tended to encourage legal suits which clearly clashed with the state objective of social stability, litigation master as a profession had long been stigmatized with various pejorative labels, branded as illegal and subject to penal punishment. The memoir of Wang Zhuhui, an eminent legal secretary with a long and successful career serving various magistrates during the late 18th century, told with pride how he handled these litigation pettifoggers after catching them: they would be physically tied to a column in the magistrate’s court and set on public display to witness the litigation which they helped instigate; they would then be caned and made to repent in public the next day before being finally released. Indeed, a secret guidebook for the professional litigation masters specifically advised them not to turn up at the court to avoid being picked out from among the crowd (Chiu 2004, pp. 55-6). Despite the official ban, litigation pettifogging flourished as an underground profession that engaged in drafting legal suits as well as conniving with court runners or clerks to influence the legal outcome.

The rise of litigation pettifogging also induced a lively body of illegally published and circulated technical guidebooks for the profession under the general title of “The Secret Handbook of the Litigation Masters” (讼师密本). If we add these to various privately published handbooks for

the legal secretaries (such as Wang Zhuhui) and bureaucrats as well as numerous well-known private compilation of legal cases tried and ruled in the court, we have a substantial body of legal literature in traditional China (Zheng 2003, p.497-8). There is an official Chinese version of “jurisprudence” (Lu-Xue 律学) which almost exclusively focused on technical issues on the application, interpretation and exposition of official legal punishment. In fact, Shiga pointed out the etymology of the word 律 (Lu) refer to musical notes, which implies that the Chinese “Lu-Xue” is all about finding the appropriate scale of punishments for crimes (Shiga et al, p.16). Clearly, these legal publications in China differed significantly from the Western jurisprudence developed through the formal institutionalization of an independent and autonomous legal profession and legal education. For that matter, Shiga and others also questioned the appropriateness of transliterating the term “Lu-Xue” as “jurisprudence.” (Zhang Zhongqiu chapter 6, Shiga et al, p.13-15).

What is missing in the state-dominated legal regime is the institutional capacity to generate bottom-up process of law-finding and law-making. Indeed as pointed out by Zheng Qin, the published compilation of legal cases often led to the use of “rulings by analogy” (类比) by officials in their legal trial in order to achieve some form of consistency in their legal decisions, something of a precursor to a doctrine of precedent. However, in China, except for those rulings approved by the Imperial government, the practise of ruling by analogy was often discouraged for fear that officials may deviate too far from the formal codes or imperial instructions (Zheng, p.501-2).

Similarly, as Jerome Bourgon pointed out that the direct transliteration of modern Western legal terms on traditional Chinese terms could sometime lead to misconception of the fundamental gap between the two legal traditions. Bourgon pointed out that there is no equivalent legal term in Chinese that corresponds exactly to the Western terminology for “customs.” The direct transliteration of “custom” for the Chinese word “xiguan” (习惯) could be misleading. “Customs” in the West was not merely a sociological phenomenon but also a judicial artefact, asserted by witnesses, or appreciated by the jury, often with a clear territorial delimitation. In contrast, “customs” in China, according to Shiga and Bourgon, identifies only loose, mostly unwritten social practices without territorial delineation. They might at times serve as a reference but almost never formed the specific legal basis upon which the county magistrates made their decisions or the litigants made their claims. They do not “harden” into law.

This gulf between formal legal rules and private customs has been widely noted. Deng Jianpeng for example pointed to the clear expressions of private property rights in various forms could be found in the tens of thousands of private land sale contracts in traditional China. But there were few attempts of any systematic institutionalization or codification of these rights in the state legal system whose overriding interest in private land transactions had remained in the securing of land taxes.¹⁰ The

¹⁰ See Deng Jianpeng, chapter 1 for various examples how property rights in land were often identified with the payment of state land taxes. Bourgon 2006 makes similar points. For some recent studies that reveal the highly sophisticated and rational features of private customary practices in land contracts in traditional China, see Long Denggao.

other illuminating example is the case of copy rights in traditional China. Contrary to the contemporary image of an absent tradition in intellectual property rights, Deng argued that the early invention and diffusion of printing had led to rising demand and repeated attempts by the publishers to assert and defend property rights of their printed editions, yet none of these attempts received any clear backing from the state or institutionalization in the formal legal system. Meanwhile, the state's own heavy handed regulation of publication and copy rights were largely motivated by political censorship or the protection of state sponsored publications of Confucian classics (Deng, chapter 3).

So, in short, we need to distinguish a legal regime that has the capacity to transform disparate customs and norms into generalizable and positive legal rules or precedents as in the West from one that entrusted and embedded similar moral and ethical principles in the hearts and minds of individual bureaucrats or mediators as in the case of traditional China. As internalized and intuitive reasoning did not enter into a sphere of public knowledge subject to debate, reflection, analysis or synthesis, they did not possess one of the most important dynamic element that Berman emphasized for European law: its historicity, or its capacity to grow with its own internal logic. This may be the distinguishing hallmark between the rule of law and rule of man, a point that could be lost in the type of ex-post "matching exercise" conducted among recent Chinese legal revisionist scholarship.

III. Political Institutions, Legal Regimes and Public Knowledge

To understand the roots of this divergence in legal traditions, we may need to go beyond mere intellectual sphere and venture into the larger historical context of political structures in a centralized empire in China versus political fragmentation and independent competing power groups within each polity in Western Europe.¹¹ The peculiar political structure that had fragmented Western European political landscape since the Medieval era not only made possible a regime of inter-state competition, but also created autonomous space within a single polity for independent corporate bodies that embodied commercial or propertied interest. As argued by Greif (2008), the existence of elites with administrative powers in Europe constituted an essential pre-condition for the rise of constitutionalism. In England, the ability of parliamentarians to mobilize administrative and military counterweight against the King created space for the growth of these independent corporate bodies such as the legal community. Indeed, the legal community sided with the parliamentarians to control the jurisdiction of the King's prerogative courts in the seventeenth century (Berman 1983, pp. 214-215). Even as the supreme ruler of the land, King James I was famously admonished by his own royal chief justice, Edward Coke, that the power of adjudicating legal cases did not lie in his hands, but in those of professionally trained judges guided by the laws and customs of England (ibid p. 464).

¹¹ Shiga attributed the non-adjudicative legal regime in traditional China to the absence of "adversary" culture in traditional China as could be seen in ancient Greece. See Shiga 2002, p.368. This cultural explanation seems hard to square with the motto held by victory-driven litigation masters in Ming and Qing China: "to win one hundred legal suits out of one hundred" (Chiu, 2003).

In this regard, the precocious rise of a unitary political rule in imperial China offers a mirror case study. While early elaboration and “rationalization” of a bureaucratic law that served well the aim of political control and social stability, the political dominance of a unitary imperial rule founded on the elimination of any independent contending elites and supported by a highly centralized bureaucratic machine could have possibly stifled the growth of a civil society which were essential for the existence of an independent legal profession. Ultimately, a legal system embedded within this type of political structure remained dependent upon a power structure.¹² Often higher level officials and gentries with higher degrees were simply beyond the laws of the magistrate’s court or courts of any bureaucracy at the lower hierarchy. Chinese law, as pointed out in Ch’u T’ung-tsu’s classic study, is fundamentally hierarchical with the senior members in a society (whether defined by bureaucratic status, age or gender) entitled to lesser punishment to the same crime than the junior ones.

In this system, properties or property rights were only derivative to social and political status of individual members within the power hierarchy. The concentration of wealth in the distinctively bureaucratic class of Chinese gentry and the massive investment of Chinese merchant lineage in their offspring’ preparation for China’s Civil Service Examination are all testimony to the predominance of political posts over property

¹² For a narrative on the political structure in traditional China and non-alignment of the imperial rulers and property class, see Ma 2009 and also Deng.

ownership.¹³ In the West, the political institution of representation, defined and endowed the property owners and wealthy elites with political power. In China, the channel of power went in the opposite direction: from political power emanated the property. Hence, Deng Jianpeng presented a case of a fundamental dilemma of property rights in China: the absence of formal legal protection sent property owners to seek custody under political power, yet property defined and acquired through political power lacked legality (Deng, p. 69).

This dilemma may not be paradoxical in the context of substantive justice as delineated by Weber. The lack of hard rules and objective standards, while posing risks for property rights and contracts, gives the authority discretionary power to influence the outcome of certain actions *ex-post* in an intended direction. The lack of distinction between legal and extra-legal, or what Liang Ziping termed as “ethicalization of law” and “legalization of ethics”, gives the rulers a free hand to intervene where they saw fit in almost any aspect of Chinese society, public or private, criminal or civil (Liang 2002, chapters 10 and 11). Meanwhile, given the resource constraint of a traditional empire, it also gives the rulers the discretion to keep their hands free from areas where no direct state interest was at stake. Indeed, the states’ long-standing policies on civil and commercial disputes were to discourage formal litigation and encourage self-resolution. In many cases, the state found it expedient to “farm out” coercive violence

¹³ See Chang Chung-li for the enormous wealth accumulated by Chinese gentry bureaucrats. For widespread practise of buying official titles by wealthy families see Deng, p.68-69.

or disciplinary duties to non-official elites as a means of social control.¹⁴

In turn the state would impose a system of collective responsibility over the leaders of these groups and communities. Judged in this light, substantive justice is very cost-effective and distinctly rational.

It is important to note that this disciplinary mode of justice coupled with community sanctioning mechanism supported a high degree of market exchange and commercialization as we observed throughout Chinese history. Furthermore, even in the West, relationship and personal based mechanism of contract enforcement remained important and functional in the presence or “shadow” of formal justice. In fact, as pointed out by Greif and others, informal mechanism probably functioned well or even better than a formal legal system (which is expensive to set up) when the extent of exchange and the scale of operations remain small and local (Greif 2006 and John Li). It was when the scale, the extent and frequency of exchange began to stretch across space and time that the costs and risks tend to grow exponentially. An independent formal legal system with replicable standard and enforceable rule is a powerful aid to the large scale of impersonal exchange and complicated commercial and industrial organizations that had characterized modern capitalism. Indeed, Thomas Stephen's characterization of Chinese legal system as a disciplinary mode of justice was constructed in the context of the treaty port of Shanghai where Western and traditional Chinese legal system came head to head. It was the rise of

¹⁴ Shiga, for example, documented in detail the sanctioning of the power of capital punishment to lineage leaders over their own members subject to official review (2002, chapter 2). For the power of corporeal punishment in villages and guilds, see Han 2004, chapter 2 and Weber 1951, chapters 4.

exterritorial rights and a Western legal system that underpinned the rise of large-scale Western and Chinese enterprises to support the phenomenal rise of modern Shanghai in the early 20th century (see Ma 2008).

There is a dynamic advantage of a formal legal system associated with the growth of public knowledge in the form of jurisprudence. Indeed, as others have argued that the logic of legal growth through the derivation of transcendental rules from the study of practical legal cases and private customs based on jurisprudential reasoning in many ways paralleled some methodological features that underpinned early modern scientific revolution. Just as the growth of an autonomous science community had been essential to the rise of the scientific revolution, the rise and growth of an independent legal and academic community running from the apprenticeship based training legal guild to the higher institution of university law school also underpinned the basis of European legal revolutions.¹⁵

In this context, Joel Mokyr's recent resurrection of the role of the scientific revolution and industrial enlightenment to the industrial revolution in England is highly relevant. The significance of the industrial revolution lies in its cumulative and sustainable effect on growth which is distinguished from earlier growth spurts that usually peter out after a period. What changed in 18th century Europe is what he termed an expanded epistemic base resultant from the foundation of scientific

¹⁵ See again J.H. Baker (2002) for the case of English legal community and Berman (2002, pp. 265-9) for an argument on the methodological linkage between legal jurisprudence and scientific thought in the seventeenth century. Toby Huff (2003) represents a major proponent on the linkage between legal institution and scientific revolution in the West.

revolution and industrial enlightenment. Key to this argument is that knowledge has the characteristics of a public good and acts as a fixed input that could generate scale economies. Furthermore, through a feedback loop between what he termed prescriptive and propositional knowledge, knowledge itself generates a learning process that creates new knowledge (Mokyr 2002).

While much has already been written in the sphere of science technology, future research should also explore the mechanism that ties together the role of political institution, legal regime and jurisprudence (as public knowledge) to long-term economic growth.¹⁶ This thesis might also be highly relevant for explaining long-term economic and institutional trajectory in traditional China. The process of social and collective learning – a process which might be the key to cumulative long-term institutional change – would either falter or truncate when legal knowledge was driven to secret circulation or legal community turned underground as in traditional China. The lack or paucity of new ideas theories on political and legal regimes might well explain the frequent change of political regimes or dynasties marked by violent rebellions and revolutions throughout Chinese history often degenerated into mere modified replications of the old order that the rebellion had come to replace.

¹⁶ For a narrative on the feedback loop that runs from the ideas of John Locke, the French enlightenment thinkers and the American federalists and the political events of Glorious Revolution, American Independence and French revolution, see Berman 2003, pp.13-16.

III Conclusion

Our debate on the “Great Divergence” should integrate the divergent traditions in legal traditions and institutions between China and the West in the early modern period. To the extent that those institutional and epistemological elements that underpinned the legal revolution in the 11th and 12th century – the separation of Church and state, the emergence of an independent territorial jurisdiction, the pursuit of transcendental, objective and rectifiable standards – were also relevant, as argued by Toby Huff, for the rise of a scientific revolution in early modern Europe, one needs to take seriously the linkage between legal institutions and the origins of the industrial revolution.

It is important to note that the relative efficiency hypothesis of divergent legal traditions is a positive not a normative statement. Nor is it a verdict against the relative merits of comparative civilizations or multiculturalism. The Western experience shows that a private social order not only constitutes the evolutionary basis for public institutions but also continues to play an indispensable role even in modern economies. In China, the inherited cultural and institutional endowments are essential to the making of economic miracles. The long experience of social networks, communities and informal institutions accumulated in China helped reduce transaction costs and supplied trust to enable economic growth to occur in the 19th and 20th centuries even before the clarification and reform of formal rules and institutions. The traditional preference for flexibility over fixed rules may have helped Chinese reform in the early 1980s to successfully evade much of the ideological rigidities with little

social tension. This may have contributed to the spontaneous emergence of institutional innovations of a highly experimental and often ad-hoc nature ranging from the household responsibility system, the township and village enterprise, to the overseas Chinese networks of FDI to China.

These developments have led to reinterpretation of Chinese economic history which has taken to task the long-term stagnation thesis and contend for a case of substantial progress in industrial and agricultural technologies, expansion of regional trade, growth in urbanization, and perhaps even demographic transition for early modern China. While both the post-WWII East Asian miracle and post 1980s China miracle provided the important motivation for the revisionist impulse, it is often too easy to forget how much political and institutional transformations had transpired in the last one and half century to enable modern economic growth as achieved today. What probably distinguished East Asia from the rest of the developing world today, or what Max Weber had failed to anticipate, is her learning capacity to absorb not only Western technology but also formal institutions - from legal system to state-building and to monetary regimes. One of the pillars of the Meiji reform in Japan was the adaptive introduction of Western legal institutions ranging from the Constitution to commercial law, to modern accounting and joint stock corporations. In China, legal reform was delayed until after the turn of the 20th century when the first set of civil and commercial codes were being compiled with

the aid of Japanese legal specialists.¹⁷ But with the collapse of the Qing empire and the nation thrown into civil disorder after 1911, the implementation of legal and institutional reform was severely curtailed. As I argued elsewhere, much of the economic divergence in today's East Asia could be traced to the differential patterns of political and institutional response to the Western challenge in the mid-19th century (2004a).

Clearly, the administrative nature of Chinese traditional justice continues to exert a dominant influence on contemporary Chinese legal apparatus under the garb of a Western Civil Law regime. The fact that economic growth occurred largely in the absence of rule of law during the last two decades should not be viewed as a vindication of its irrelevance. On the contrary, Chinese economic reform borrowed and used ready-made institutions founded on those legal concepts that had taken centuries to evolve in Western Europe. Eventually to sustain the growth beyond the stage of institutional adaptation, a transition to the rule of law, one form or another, may become imperative for China.

¹⁷ It was also in the 1920s that a government sponsored massive survey of various private customs on private property rights and contracts were conducted with the aim of deriving formal legal rules from private customs. See Liang 1996.

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CPC's Leadership and PRC's Constitution

Introduction

One famous Chinese jurist once had said that “the progress of the rule of law” in China always follows the routine “two steps forward and then one step back”. For a long time, CPC always had trouble in dealing with its role under the ideology of rule of law and constitutionalism, especially when it comes to the separation of politics from government institution. Since the foundation of PRC, CPC has kept maintaining his role as a leader in all aspect of the nation, inserting its ideology of Marxism, Leninism, Maoism, the Deng xiaoping Theory and the “Three Represents” theory into the state Constitution is one of the ways. In fact, as time went by, there is an inconsistent of the recognition on CPC's role under “Rule of Law” in relation with the principle of “leader in all aspect of the nation”, which had been set up in both the State Constitution and the CCP Constitution.

The 1982 State Constitution and Party Constitution after 11th CPC National Congress are significant events on the history of PRC. Both Constitutions actually announced the end of an era, an era that CPC can explicitly take control of everything in PRC. Since 1980s and Open up policy, the development in economic is tremendous. The embrace of private economy, the recognition of human rights and emphasize of the Rule of Law can be seen as the response to such development in the political area. Although people are increasingly concerned about current silentness of political reform, some reforms had taken places during 1980- 2006 and they are producing positive effect to the society.

Party's Constitution is the supreme rule for the CPC member, State Constitution is the supreme law for the Chinese. NPC is the highest organ of the State Power. The Constitution stated that Political party need to obey the Constitution and it also said that all the Chinese is under the leadership of CPC. People always confused by such statements and the logic behind them. Who possess the supreme authority? What's the relationship between the CPC party Constitution and State Constitution? All these questions are touches the fundamental issue of the CPC's leadership and essential nature of the CPC's leadership. All these questions are tricky, ambiguous and controversial. In order to give readers some clues, this report is trying to present the Chinese Scholars (including Taiwan) discussion about the CPC's leadership. In interpreting this topic, the report will separate into 3 chapters, which are specifying the CPC's leadership in relation with the State Constitution, Party Constitution and Legislature.

The first chapter will explore the similarity between the Party Constitution and State Constitution and scholars view on Party's Constitution's effect on the State Constitution. The next chapter will have a further discussion on the CPC's leadership in relation with the State Constitution. It will present you the disputes on who possess the supreme authority of the power. In Chapter3, the reports will talk about

the relationship between the CPC and NPC, how CPC legalize its power through the NPC, and how CPC carry out its leadership through the internal and external system. Hope this organization and analysis can give reader a good start on understanding the presented questions.

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Chapter I

CPC leadership: State Constitution and Party Constitution

INTRODUCTION

No one say State Constitution copies the Party Constitution, however, if you look close enough it is easy for you to discover the fact that: State Constitution records all the changes in the Party Constitution. Behind such interesting similarity, some scholar's points out that Party Constitution is the guard of the State Constitution, Party Constitution provides official tool to interpret some fundamental constitutional principles.

SUMMARY

In this chapter, it talks about the Party Constitution's effects on the State Constitution and how the scholars see this issue. To illustrate this topic, this chapter will first go through the amendment of the State Constitution and Party Constitution. By comparing the provisions in both Constitutions, the reader will find out the similarity and how State Constitution "copies" the Party Constitution. Next, this chapter will give some scholars view on the relationship between the State Constitution and Party Constitution

1. The amendment of the State Constitution in reflection of the Party Constitution

In mainland China, State Constitution and CPC Party Constitution have a very close relationship. If you go back to check the history of the Constitution amendment (Chapter 3 has a detailed discussion) you will find out that each Constitution revision is based on the Party Constitution. From the most recent revision, which incorporated the "Three representatives Theory," to "the Four Cardinal Principles in 1982" the connection between the State Constitution and Party Constitution become an important feature for the CPC's leadership. From the following discussion, you will see how CPC's leadership was supported by this connection between the State and Party Constitution.

One of the outstanding parts of the 1982 Constitution was the reorganization of the nation's main task "to concentrate its effort on socialist modernization along the socialist road with Chinese characteristics." However, like other essential principles that mentioned in the state constitution the changes are due to the CPC Constitution's revision. By proving this conclusion we can check some important amendments during the 1980s' CPC national congress and compared those amendments with the 1982's Constitution. It would not be hard to realize that all those theories and conclusions repeated in CPC's national congress reports later become part of State Constitution.

On 1982, 9, 6 the 12th National Congress of the CPC of China amended and adopted the 1982 CPC Constitution. It stated that:

Class struggle is no longer the principle contradiction. At the present stage, the principal contradiction in Chinese society is one between the ever-growing material and cultural needs of the people and the low level of production. Owing to both domestic circumstances and foreign influences, class struggle will continue to exist within a certain scope for a long time and may possibly grow acute under certain conditions, but it is no longer the principal contradiction.

Also, it points out that the four modernizations is the primary and core goal in the future, CPC shall focus on lead people to build socialist modernization. On Dec 1978, the Third Plenary Session of the Eleventh Party Central Committee proposed that "CPC shall assure that all man shall be equal under the law, no one shall possess the power beyond the law." On 1981 the CPC 6th Plenary session of the Eleventh Party Central Committee has passed RESOLUTION ON CERTAIN QUESTIONS IN THE HISTORY OF OUR PARTY SINCE THE FOUNDING OF THE PEOPLE'S REPUBLIC OF CHINA. In this document, it provided that "As with

CPC leadership and PRC's Constitution

other social organizations, Party organizations at all levels must conduct their activities within the limits permitted by the Constitution and the law.”

Now compared with the changes in Party Constitution, let's get back to the 1982's State Constitution. In the paragraph 7 of the preamble of the Constitution, you can find this sentence:

“The basic task of the nation is to concentrate its effort on socialist modernization along the socialist road with Chinese characteristics.”

Also in the next paragraph you can find such sentence:

“Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road,”

This sentence is the mimic of Deng Xiaoping's Four Cardinal Principles, which means the principle of upholding the socialist path; the principle of upholding the people's democratic dictatorship; the principle of upholding the leadership of the Communist Party of China, and the principle of upholding Marxist-Leninist-Mao Zedong thought. You can also find similar language that requiring CPC obey the law, such as:

[A]ll political parties ... [i]n the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.

More examples can be discovered in the later amendments, such as in 1993, the NPC passed and recognized the Constitution Principles “China is currently under the primary stage of socialism” and “the state-owned economy is the force in the national economy”. These principles are originated from the 1992's CPC party constitution. The CPC party constitution provides that:

The Party must carry out fundamental reform of the economic structure that hampers the development of the productive forces, and keep to and improve the socialist market economy;

In 1999's Constitution, it provides that, the similar words can be found in 15th of Party Central Committee:

[T]he Communist Party of China leads the people in promoting socialist democracy. It integrates its leadership, the position of the people as masters of the country, and the rule of law, takes the path of political development under socialism with Chinese characteristics, expands socialist democracy, improves the socialist legal system, builds a socialist country under the rule of law, consolidates the people's democratic dictatorship, and builds socialist political civilization.

Other principles “The lawful private property of citizens may not be encroached upon.[article 13] ” And “The state respects and protects human rights. [Article 33] ” all can find its origin from the CPC Constitution.

Thus all these examples can indicate the fact that without the change of the CPC Party Constitution, there will be no any symbolic creation or changes on the Constitution.

2. The Party Constitution's importance to State Constitution

Like one scholar pointed out that, the CPC Constitution is of special importance and functions in the political affairs of the Party and the state. It possesses the universal law features and becomes a law from its external forms, substance, stability and coercion. Party Constitution has many functions such as standardizing the leadership and ruling power, regulating the inner party relations guaranteeing the state laws, etc. Due to the significant nature of the party constitution, it produces some effect on the state constitution.ⁱⁱ

First, the Party Constitution ensures the enforcement of the state constitution because they share the same value. State constitution and state law are made by the people under the leadership of the CPC, same as the party constitution; they all represent the people's will and interest. The Party Constitution carry out higher standard than the state constitution, thus the party member and party organ's conduct is in the region of the state constitution if that conduct is comply with the Party constitution, Second, due to the fact that CPC's core leadership in the society, Party constitution is the guarantee of the state constitution. Deng Xiaoping once said: without the party constitution, regulations and disciplines, there is no guarantee for the state constitution. Jiang zemin once had said that "To rule the Party and manage it strictly before running a Country. Uphold the Party's Strict Administration to Itself"

In summarize the relationship between the CPC's constitution and State Constitution, one scholar holds that, whether the state Constitution can be strictly observed, the key is the CPC itself. The history of PRC shows that as long as CPC itself and its leader can follow the constitution, the state Constitution can be strictly observed. Moreover, CPC Party Constitution created some important principles that involved the state constitution. CPC's interpretation of these principles would greatly determine the NPC understands of such terms and principles.

He then cites an example to illustrate his analysis. The CPC Party Constitution provides that "Leadership by the Party means mainly political, ideological and organizational leadership. "Each form of the leadership will directly or indirectly influence the implementation of the Constitution. For example, arrange the secretary of CPC municipal political -legal Commission also served as the member of standing committee of the municipal CPC committee and chief of the local Public Security Bureau. Such practice has been existed for a long time and still takes as a common practice. As the result of such practice, the political status of the court and Procuratorate is inferior to the public security bureau. Based on the reality of the Party Constitution's influence, in building the constitutional supervision system we can first test that whether the party member's conduct was conform to the Party Constitution.

Chapter II

CPC's leadership, CPC and the State Constitution

INTRODUCTION

From now on, all matters within the competence of the government will be discussed and decided upon, and the relevant documents issued, by the State Council and the local governments concerned. The Central Committee and local committees of the Party will no longer issue directives or take decisions on such matters. Of course, the work of the government will continue to be carried out under the political leadership of the Party. Strengthening government work means strengthening the Party's leadership. ON THE REFORM OF THE SYSTEM OF PARTY AND STATE LEADERSHIP August 18, 1980

The above statement is coming from the Deng Xiaoping's famous speech. For many years since the 11th CPC national congress in 1980s, the argument about the party's leadership never ends, this become especially problematic when it comes to the regime of Constitution. The Constriction set up some principles such as Rule by law, People as the master of the country and under the leadership of the CPC... Do these principles indicate CPC's centralized leadership? Does these principles conflicts with the CPC's leadership? Who has the supreme authority, Law or the Party? Whether the Party ruled by law, or party rule China by law? This chapter will explore some of these issues and hope it can clarify some of the issues.

SUMMARY

This chapter is mainly focusing on the topic of CPC's leadership in relation with the State Constitution. In this chapter, the writing is trying to explain what is the CPC's leadership? What's the scope of the leadership, how CPC carry out its leadership, who is superior, CPC or the state Constitution and how state Constitution principle developed in relation with the party's leadership theory? In order to answer these ambiguous and tricky questions, this chapter will first give an introduction on the revisions of the 1978 and 1982's Constitutions, let the reader have an general view on how the CPC itself saw these problems and how the

revisions reflect the CPC's attitude on its leadership. Then, this chapter will provide a short discussion on "what is the scope of the CPC's leadership and how CPC carry out its leadership." Later, this chapter will have a long and detailed debate on the topic "CPC's centralized leadership and its confliction with the Constitution." Last, as a summary, the chapter will go through two important Constitutional principles "Rule of Law" and "Three representatives." The reader will learn how these principles interact with the debates on the CPC's leadership.

1. The revision of the state Constitution and CPC leadership

In the history of PRC, there are actually 7 revisions for the state constitution since 1954. For the purpose of the discussion in this report, we can divide PRC's constitutions as date prior 1982 and date after 1982's Construction. The 1982 Constitution started many reforms both in the economics and politics and it is a watershed that distinct the constitution's position on CPC's centralized leadership. This part of the chapter is mainly talking about the revision of the 1982's constitution. This revision had so many new features that produced grate effect on the recognition of CPC's leadership and the understanding of CPC's relationship with the state, the law and people. In fact, the 1982's constitution is the start point and it sets the theory foundation for all the later discussions, debates and reforms of CPC's leadership in relation with China's political structure.

Some highlights of 1982's revision are provided here before we go deep into the details of the revision:

- The 1982 constitution was drafted under the NPC's commission instead of CPC's committee;
- In the preamble, it deleted the expression of NPC is under the leadership of CPC;
- In the main body, moved the section of people's civil right before the section of state structure
- Set up the Four Cardinal Principles in the preamble and clarify the CPC leadership is political, organization and ideology;
- Removed all the CPC term and relevant requirements from the main body of the Constitution.

First, NPC went back to the position as the highest organ of the state power. This can be reflected by the two facts.

1) The NPC became the "leader" in the constitution revision. The 1975 and 1978 Constitutions were actually created by the members of Politburo and the Standing Committee of Politburoⁱⁱⁱ. For the 1982 constitution, the decision for revision was made by NPC, the actual draft was also conducted by Constitutional Amendments Committee.

2) During the culture revolution, the article 16 of 1975 constitution provided that "NPC is the highest state power under the leadership of CPC" this is clear language indicated that CPC is more superior to the NOC, it confused the distinction between the CPC and the government. Thus, the 1978 and 1982 Constitution deletes the part of "under the leadership of CPC"^{iv}

Second, another essential change is to move the section of the fundamental rights and duties of citizens before the section of the structure of the state. The drafter reasoned that the state was created by the will or consent of its people, who are the source of the political power. Later Deng Xiaoping agreed with this arrangement. This new change reflected the acceptance of people's right.^v

Third, the CPC's principle was put in the preamble instead of the main body of the constitution. In 1981, 7 Deng Xiaoping asked Peng zhen to keep 4 principles in the Constitution, which are: 1, The Four Cardinal Principles; 2, The people's democratic dictatorship led by the working class and based on the alliance of workers and peasants; 3, democratic centralism; 4, The system of regional autonomy for ethnic minorities. After repeated analysis and debates, the committee believed it is hard to put the Four Cardinal Principles in the main body of the constitution. For example, it is unrealistic to requiring everyone hold the belief of Marxism and Maoism. Moreover, even Deng Xiaoping had once emphasized that "we shall avoid mentioning Marxism and Maoism in the main body of the Constitution"^{vi} 《邓小平年谱（1975-1997）》中

About the CPC's leadership, the 1982 abolished life tenure in leading posts in order to prevent centralized leadership^{vii}p. But at the same time it kept the system of people's democratic dictatorship in the Constitution instead of people's democratic. One drafter reasoned that, as we know the class struggles will exist for a long time. Considering the fact that the Chinese people must fight against those forces and elements, both at home and abroad, we cannot abandon the dictatorship over the enemy."

Although some people have disputes about this, one of the drafter, Wang hanbing, believed that the preamble is enforceable under the law and it can be applied in a flexible manner.

Another significant revision is the fact that though the expression of "Chinese people of all nationalities led by the Communist Party of China" had appeared for 3 times in the preamble, it never appeared in the main body of the Constitution after 1982. In fact, you cannot find the term "CPC" or "led by CPC" from the first provision to the last provision.^{viii} This arrangement was not coincident; it was the result of deeply analysis and debates. To understand such arrangement, we can compared 1975 Constitution and its draft that passed during 1970. Those constitutional documents were created during the end of "culture revolution", they denied "all people equal under the law". Furthermore, in the main body of the Constitution it frequently mentioned the expression "under the leadership of CPC". Such requirement can even find in the section of "civil right of the people." Ironically, the draft of 1975 constitution even provided that people's basic right and duty is to support Mao Zedong and its partner Lin biao and support CPC's eldership. Apparently, such sentence was later deleted.

1982 Constitution was created after the 11st CPC national congress, when the CPC try to correct the "culture revolution's" mistakes. At meantime, the new party constriction required that "The Party must conduct its activities within the framework of the Constitution and laws of the country" during the 12th CPC national congress's report, it provided that "from the top level to the grass root level of any party organ or party member, all shall not violate Constitution and law". Thus, under these circumstances, it is reasonable to remove the CPC or its leadership from the main body of the Constitution.

In summary, it is widely believed that the 1982 Constitution made some significant and fundamental changes. All these changes are serving the purpose of correcting the left mistakes of the culture revolution. It is clear that, the 1982 constitution is a start point for the new direction of CPC leadership theory, it set the ideology foundation: The Four Cardinal Principles; it recognized the civil right and CPC activity within the scope of the law; it also not so successfully but somehow clarified CPC leadership is political, ideology and organization.

2. Constitution and CPC leadership, who is the supremacy authority

Some scholars believe that although there are many defects and flaws, 1982 Constitution was a good start for reforming centralized party leadership. However, other scholars hold a different view on this issue. They argued that after 1982 constitution, some expression though conflicts with the CPC leadership, they never being clarified or changed. For example, the constitution provided that people are the master of the country and CPC support Rule of Law on the one hand. But on the other hand, it claimed that CPC leads people making the law and CPC's activity shall not exceed the law. Based on such expression in the constitution, a strange question has emerged: Since CPC lead people making the law, who are more superior.

For this question, there are several theories. One theory provided that such dilemma or the contradiction is the direct reflection of CPC's centralized leadership. Such expression in the preamble is purely aid CPC to legalize its ruling. Another theory provided that there is no confliction within the constitution because CPC represents people's will, Constitution represents and protects people's will, thus expression of CPC lead people making law could not possible create supreme authority issue. The third theory even argued that despite all the conflictions, people's interest and people's will is the connection between the Constitution and Party's leadership. As long as the people's interest is represented and people's will is exercised, it could not have any confliction.

1) One Taiwanese Scholar's view

Some Taiwanese Scholars argued that the PRC Constitution is contradicting with the concept of constitutionalism; also the expression in the preamble indicated the nature of CPC's centralized leadership. Here is the excerpt from his argument:

Compared with other countries, even you can find similar language of human rights protection in PRC's constitution, the prerequisite of the constitution framework is not conforming to the concept of Constitutionalism.^{ix}First of all, the article 57 of the Constitution provides that NPC is the highest organ of state power. But at meanwhile, it also provides that "Under the leadership of the CPC and the guidance of Marxism- Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents', the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road." These

provisions suggested that in china, CPC exercise centralized leadership. Under centralized leadership, there is no separation of legislative and administration. CPC is self supervision and self executing.

Moreover, according to the CPC's ideology, law only reflects the will of ruling class. Thus, law cannot be the fair rule for everyman of the society. CPC emphasized that the foundation of the country is based on the dictatorship of the proletariat. Obviously, such dictatorship is contradicted with the concept of civil rights.

Furthermore in the preamble of the Constitution, it provided that all Chinese is under the guidance of the Marxism- Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents. This is contradicted with the article 36 Citizens of the People's Republic of China enjoy freedom of religious belief.

2) What is CPC's leadership and how CPC carry it out

As we reader above, Chen kuide pointed out some contradictions between the preamble and the main body of the Constitution. All these contradiction are relating to the issue of CPC's centralized leadership and its relationship with the state law. Before we discuss the confliction, let's take a look on what is the CPC's eldership and how CPC carry it out.

After the 13th National Congress of the CPC, the party's leadership had been defined as political, ideological and organizational leadership. ***Political leadership means** practice democratic and scientific decision-making formulate and implement the correct line, principles and policies; ensure the socialism nature of the country...**Organizational leadership means** that the Party must play the role as the core of leadership among all other organizations at the corresponding levels. **Ideological leadership means** that in control of the creation, spreading and developing the socialist ideology.

Different type of the leadership has different way of carrying it out, for example: CPC exercise political leadership though the legal procedural to make the CPC's will become the state will^{xi}; The CPC's ideological leadership is exercised though the education; The CPC's organization leadership is exercised though the party's organ in various level of the social activity. To party's inner system, like the party organ or party member, the leadership was exercised though the Party constitution and other party regulations. To the external system, such as the lay person, the leadership was exercised though the education and recommendation of the carders. To the state, the leadership was exercised though the legal procedural. By transmit the party's will into the state will though the legal procedural.

3) Disputes on whether there is a confliction between the CPC leadership and Constitutional principle

a. Views on there is a conflict

Some scholars might not directly criticize or make conclusion that the current CPC leadership is centralized leadership, but they do point out some unreasonable conflictions between the Principle in the preamble and CPC's leadership. Here is one of the theories:

Socialist democracy with Chinese characteristics was once again characterized as “under the leadership of CPC, people are the master of the country and the rule of law” since 1982. However, the CPC's control over all aspect of the state and the society trigger two elements in relation with the constitutional principle.

One element is the NPC's position as the highest organ of state power in relation with the principle of “people as the master of the country”. According to the Constitution, CPC upholds and improves the system of people's congresses, the system of multiparty cooperation and political consultation under its leadership. CPC can render its proposal into State's will though due course of the law. Another element is the Constitution's nature of independence in relation with the principle of “rule of law”^{xii}. according to the 15th of CPC national congress, it means that under the leadership of CPC, people shall managed the state afire, economic afire and society in accordance with the rule of law. Safeguard the state afire in accordance with the law and archive the socialism democracy in steps. The rule of law will not be changed due to the change of the leader.

Thus, if the above assumption is true, when it comes to the leadership of CPC, a tricky question became obviously: Who is superior, the Party or Constitution?^{xiii}

b. View on there is no confliction

Apparently, based on different theories or different angles, some scholars managed to find a way to this question, they reasoned that the party cannot conflict with the constitution. This is illogical because the CPC represents people's will and Constitution represents people's will and thus there is no way to have any contradiction. Moreover, many scholars site the words from the top leader of CPC, such as Jiang zeming and Deng Xiaoping, to support their opinion Furthermore; they argued that the NPC's national report gave the conclusion for this question “People's interest” is the connection between the party and Constitution.

For example, they first analysis the definition of the constitutional principle

“Rule of law” Rule by people is the essence of the socialist democracy. Rule of law is CPC's basic strategy to lead people. The constitution and law represent the unification of party's proposal and people's will. Thus, based on the above analysis, the key that connect the concept of Rule of people and Rule of law is the Popular sovereignty and people's interest.

Then they discussed the purpose of CPC's leadership,

The purpose of CPC's leadership is to ensure the people's position as the master of the country. The meaning of rule of law is to rule the state in accordance with the constitution and law. The state law and the Constitution will represent the unification of Party's proposal and people's will. So there would be no conflict of the interest.

Also, some CPC officials' words become part of the argument. **Jiang zemin** once sated in his speech to the CPC central party school “developing the socialist democracy, building socialist civilization is the

important goal of socialist modernization construction" "the key of developing socialist democracy is to maintain the dialectical unification of three goals of insisting on the leadership of CPC, people's position as the country master and rule of law"^{xiv} One scholar sits Deng Xiaoping's opinion on the relationship between the CPC and the law.^{xv} First, CPC cannot see people as the tool, in the contrary; CPC shall recognize itself as the tool of the people in accomplishing certain task in the history. Second, the reason why CPC can lead people lies to the fact that CPC is the servant of the people, it represent the interest and will of the people. In Deng Xiaoping's famous speech *The reform of the system of party and state leadership* he provided that "The reason why CPC can rule the people is due to the fact that CPC can best representing the interest of the people and CPC can try to organize people fight for their interest and will. In understanding the CPC's leadership, we shall recognize that CPC cannot exceed the power of the people."

Furthermore, In 15th CPC national congress report's, it stated that "CPC leads people enact the law and constitution and CPC's conduct shall not beyond the law". In 16th CPC national congress report's "party's activity shall within the region of the law" even though the CPC is the only ruling Party, it must act inside a legal framework. No Party organization or leader should have any privileges beyond the law.

4) Does CPC process supreme authority?

The preamble in the Constitution recognized CPC as the leader but did not directly speck that CPC is the ruling party. In 2004 CPC National congress's document "decision on further improve the CPC governing capacity"^{xvi} provides that the position of ruling party is not inherited. NPC is highest organ of state power, but NPC does not possess the supreme power. NPC shall not exceed Popular sovereignty. Only people shall possess the supreme power. If the NPC's legislation infringes the basic human rights or civil rights, it would automatically invalid.

5) CPC's view on Centralized leadership (over-concentration) issue

Clearly, people had disagreement on whether CPC's leadership is centralized leadership and whether CPC is more superior to the Constitution. Nevertheless, it would be helpful and complete to incorporate CPC's view on its leadership issue. Also this would be easier for the reader to understand the next topic "the Constitution principle and CPC leadership."

The fact of the Centralized party leadership is to transform every administrative management into the hands of the party, which is unreasonable both under the practice and theory. Like Deng Xiaoping pointed out in his speech, this problem exists, in varying degrees, in leading bodies at all levels throughout the country.

a. What is the over-concentration?

Over-concentration of power means inappropriate and indiscriminate concentration of all power in Party committees in the name of strengthening centralized Party leadership. Moreover, the power of the Party committees themselves is often in the hands of a few secretaries, especially the first secretaries, who direct and decide everything. Thus "centralized Party leadership" often turns into leadership by individuals.

b. The consequence of this problem

Over-concentration of power in the hands of an individual or of a few people means that most functionaries have no decision-making power at all, while the few who do are overburdened. This inevitably leads to bureaucratism and various mistakes, and it inevitably impairs the democratic life, collective leadership, democratic centralism and division of labour with individual responsibility in the Party and government organizations at all levels.

c. The causation and CPC's attitude toward it

Deng believed that the reason behind this problem is the influence of feudal autocracy in China's own history and also to the tradition of a high degree of concentration of power in the hands of individual leaders of the Communist Parties of various countries at the time of the Communist International. However, this problem is not evolved in the single day, it has long history:

During the revolution, the issue of centralized party leadership began to merge. At the same time, some people against it, some people support it. The view was very inconsistent. After the founding of PRC, the attitude toward centralized party leadership seemed suspicious. This was especially true when it came to the Zhou enlai's speech on "party lead everything" in 1962. The problem was that the speech gave positive approval on centralized party leadership, meanwhile attached many limitations on it. For example:

On the extent of leadership: The party only takes care of the main party principle, party did not touch the details of the business.

On the subject of the leadership: It is the party organization that carries out the leadership not the individual member.

During the culture revolution period, the centralized party leadership issue reached to its summit, and it was clearly written in the party constitution. During the 3rd Plenary Session of the 11th CPC national congress, the report mentioned centralized party leadership in a wield manner. It stated that: we should works hard on the separation between the party and enterprises while under the centralized leadership of the party. After the 12th CPC national congress, the centralized party leadership never be mentioned again and the report for the first time summarized the leadership by party means political, ideology and organization leadership. Some scholars believe this was the substantial denial to the centralized party leadership

In a word, centralized leadership is more than an expression. No matter it was actual existed in the past and denied since 1982 or it is still exist, CPC currently developed many theories to support and legalize its leadership. Typically, as you can learn from different sources, CPC represents the people, thus it leads people make law and itself obey the law. CPC is safeguarding rule of law, it cannot exceed the law.

3. Constitution principles and CPC's leadership

From this part of the chapter, the reader can learn some theories around the relationship between the CPC's leadership and state constitution's principles. The first topic in this part is the theory Rule of Law, most discussions about this theory are actually relating to the ideal of "Rule the party by law." An ideal that not officially recognized in the Constitution, but later became an interest topic that shows the scholars view on whether the party should ruled by law, by which law and who will rule the party by law. next to the discussion of Rule the party by law is the discussion of "Three representatives." In this section, you will find out how the scholars reacted to the "three representatives" when it was first proposed. In relation with the previous section, I hope it will help the reader have some ideal about the relationship between the CPC leadership and the Constitution.

- 1) Rule of Law and Rule the Party by Law
 - a. Rule the party by law is WRONG

The issue of Ruling the Party by the law was raised in the 15th of CPC national congress. There are three opinions regarding the definition of this concept. 1) Ruling the party by the party's constitution, regulation and discipline;2) Ruling the party by the party's law and state law;3) Ruling the party by the state law.^{xvii} Apparently some authors did not agree with the ideal of Rule the party by law.

Some scholars provided that there are several issues if we adopt such theory. The first issue is the definition of the "Law" in such theory. Whether we rule the party by the Party regulation or the State law? Second, it is unnecessarily to have the party rule by the state law because the party regulations have higher standard than the law. Third, the purpose of Rule of law is the notion that it is the party to rule itself not someone lease rule the party.

Some people believed that the Party must conduct its activities within the framework of the Constitution and laws of the country equals to rule the party by law. Actually, this is a misunderstanding. The party's conduct has to follow the party's law and party's regulation. The state authority or the law has no power over the party's reasonable activity. The party constitution and other party regulations have higher standard than the state law, it is unnecessary to require the party rule by law.

Second, "Rule the party by law" raised the question who rules the party and whether it is the outside authority of the party itself to rule the party. The author maintained that we cannot improve the party's leadership by substituting the party's regulation with the state law, otherwise, the nature of the party will change and the party will lose its position as a leader.

He further elaborated his points by analyzing the relationship between the theory of the "Rule by Law." he provided that we cannot infer "Rule the party by law" from the theory of "Rule of Law" because the logic behind "Rule of Law" is Rule of Law under the leadership of the Party. It the Party led the state to conform with the ideology of "Rule of Law" not the state led the party to conform with the state law. The purpose of "Rule of Law" is to ensure people will follow the party's line and leadership under the legal force of state law. The Rule the party by law wish to confine the party's activity by law, such theory ignore and misunderstand the Marxism's theory on the Essence of the Law.

Last, the consequence of Rule the party by law is to dampen the party's leadership. It is opposite to the ideal of party maintaining the control over itself.

Other scholars even came to the conclusion that Law is one of the methods that achieve CPC's leadership, CPC has to ensure the enforcement of the law and the state constitution and state law should ensure CPC's position as the leader. He reasoned that the Four Cardinal Principles is the foundation of the state law. The party's principles and lines determine the content of the state law, and it instructs the direction of the development of state law. State Law is one of the methods to legalize or enforce the will of the party. Moreover, The CPC 15th National congress report provided that "Rule of Law" means that we safeguarding the party's line and principle through the implementation of law and to ensure the party's core leadership.

b. Rule the party by law is RIGHT

Unlike people against the ideal of Rule the party by law, some scholars reasoned that from a practical point, CPC maintains all the power over the country it would be disaster if CPC not rule the state by law. Also, they provided solutions for the issue of which law to be adopted under the ideal of Rule the party by law.

First, Because the is the CPC is the core of leadership for the cause of socialism with Chinese characteristics and CPC has control over politics, economics, culture and military, CPC's officials are generally the state power holder. Thus it is reasonable to requiring Rule the party by law before the Rule the state by law.^{xviii}

Second, after the open up policy, we start the market economy, which relies on the free competition and protection of law. Thus this new change render the party can no longer implement its leadership through the order. The party needs to relying on the law and regulation.

Third, though some scholar provided that we shall not adopt the rule of law to the party directly because this will create unnecessary confusion. Instead we can create a new concept based on the ideal of "Rule of Law." For the party, we can adopt the principle "Rule the party by Law" or "Rule the party by regulation" in accordance with different circumstances. The scholar further elaborated that:

"Rule of Law"^{xix} is a higher standard for the CPC's leadership. On the one hand, for the external relationship, CPC shall adopt the rule the party by law to regulate its relationship with the state. To ensure the party's leader and ruling is follow the "Rule of Law." On the other hand, for internal relationship, CPC shall adjust its internal relationship by the party regulation. This can ensure the party's internal democracy and improve the political power structure. in summary, CPC lead the state but subject to the state law. If this is not the case, that is equal to give party the right to go beyond the state law. the scholar even predict that if Administrative Law is used for regulate the government, one day we shall have an Political Party Act to regulate the party.

2) Three Representatives and CPC's leadership

This section of the article will give reader an general ideal on why some people dislike the ideal to put the "Three Representatives" into the Constitution. Basically, there are two types of arguments. First one is that the Three Representatives' content is not essential as the Deng Xiaoping Theory and Maxims Theory. Put CPC leader's theory into the Constitution indicates personality cult. Other type of the arguments focusing on the fact that Three Representatives Theory is fine but it may conflicts with the Four Cardinal Principles and People's dictatorship. Moreover, there are many unsolved confusion about the ideal of this theory.

Professor Jiang Ping had made a speech on the meeting of CPC constitutional revision group and argued that it is abnormal and unnecessary to put Three Representatives Theory into the Constitution. He reasoned that:

Revise the constitution is a serious event. It is unreasonable and abnormal to keep the tradition of revise the Constitution every time when the Party Constituent had revised after the Party's national congress. Second, the three representative's theory may conflict with the constitution principles. The constitution say we will continue to adhere to the people's democratic dictatorship. Dictatorship is not complying with the theory of three representatives. Three representatives can apply to everyone of the society but the dictatorship is not. The ideal of dictatorship was created under special historical circumstances, now we lived in a new generation with 20 years development. It is time for us to reconsidering some ideals in the Constitution.

One famous economist Wu jinglian also provided a similar argument: Three Representatives is the requirement for the CPC member, it is inappropriate to transmit such theory into the constitution as the principle that applies to everyone. Furthermore, if we incorporated the three representatives, that means we have to accept non-public sectors of the economy. This new change may conflict with the People's democracy dictatorship. Although the Three Representatives finally incorporated into the Constitution, the concern about the expansion of the interest that it represented had solved by the revision. In the main body of the Constitution, the article 11 add new sentence that states: The state encourages, supports and guides the development of the non-public sectors of the economy, and exercises supervision and control over the non-public sectors according to law.

Other scholars provides that^{xx}, if the first, second and third generation's leader put their theories in the Constitution, shall we keep this tradition to incorporate the fourth, fifth? Third, three representatives has no equal depth and width compared to the Marxism, Maoism and Deng Xiaoping Theory. Most of all, this theory never been tested by the real practice. Moreover, it is abnormal to incorporate personal belief into the Constitution. Such practice is unnormal and indirectly support personality cult. Furthermore, it is impractical to enforce three representatives in the real life. For example, it is failed to clarify the standard for advanced social productive forces? Or what is China's advanced culture? And how to define "fundamental interests of the majority", who is the majority. The author even cites several examples to support his argument: Could homeless people's interest can constitute fundamental interest? Could the right of the suspect who may subject to extortion by torture be categorized as fundamental interest of the majority? Last, who make the representation, how to

determine such representation and who are the leader? All of these questions are unclear in the theory. Thus, it is not reasonable to put this theory into the Constitution.

Chapter III

CPC's leadership, the relationship between CPC and the Legislature, the NPC

INTRODUCTION

Currently there is no document that explicitly states that CPC has a superior authority over NPC, also it took a long time before the CPC began to realize it is against the rule of law if the party directly take the control over NPC. Since 80s the centralized party leadership had been criticized for many times and the notion of transmitting party's will through the legal process had been widely accepted as a political principle by the party itself. Thus, how CPC transmits its will through the legal process? Obviously, this can be done by the connection with the NPC or in some people's eyes, the control over the NPC. In a word, in some people's view, the NPC is the ghost of CPC and CPC is in charge of everything behind and before the veil.

SUMMARY

This chapter of the article is mainly focusing on the CPC's leadership and its connection with the NPC. To illustrate this topic, this chapter will first introduce the NPC's role as the highest organ of state power since 80s and the changes of the NPC's political role as an evidence of showing NPC's independency. Then the discussion of the chapter will turn into the debates on the confusion of the different authority "CPC's decision making power" and "NPC's decision approval power". This part of the argument is the best illustration of the dilemma of Party's leadership; it touches some practical issue, whether the party has power over the NPC. Followed the argument, the reader may find some clue for that question in the part 3. In part 3, there are some further detailed discussions on how CPC utilize party organ and CDI to exercise its influence over the NPC and how such influence accomplish CPC leadership of politics, ideology and organization.

1. the role of NPC as the highest organ of the State power

Since 1980s, the durability of the NPC has greatly improved, by utilizing the Constitutional power that granted to the NPC, Peng zhen provided that the NPC has constitutional power to supervise the government. Also, since the 7th NPC, the overlapping of personnel between NPCSC leadership and the CCP's Central political -legal Commission has been disconnected. Nevertheless, the high turnover rate of the NPCSC leadership and its members suggests that the legislature is still not well bounded. Furthermore, during the 80s the legislative committees have gained strength both in size and in power. For example NPC has expanded its power by setting up more professional committees as its consultants. Most of the laws that passed by the NPCSC are being drafted by the committees instead of the CPC committee or Politburo and the Standing Committee of Politburo. The introduction of the hearing system is Also a significant step towards increasing the quality of legislation.^{xxi} About the relationship between CPC and the law, Peng zhen once said "Law is enacted by the CPC officials; all the local CPC standing committee shall obey the law. Thus, law is superior to the local CPC standing committee. CPC's leadership is not order, CPC's ruling should relying on the law"^{xxii}

2. Debates on the confusion of two authority: CPC's decision making power and NPC's decision approval power

In a word, the CCP has refused to relinquish power to the people's congress in 2 areas: decision making and supervision. One of the main build in defects of the representative system of Leninist regimes has been the contradiction between the authority of the people and that of the party. If people's congresses are to be the ultimate source of power as is stipulated in the Constitution, how then is the party able to exercise leadership without compromising that privilege? At issue then is the controversy covering their respective rights of decision making, the party's policy making power and PC's determination rights.^{xxiii} (note: the original words is *rights* not power)

Some scholars have no problem in recognizing the authority between the CPC and NPC over the state issue. For example, Taiwanese scholar Zhao jianmin believe that NPC possess determination rights, which is obviously inferior to decision making power. However, for most scholars in Mainland China, they have disputes in separation the CPC's policy making power from NPC's decision approval power. They argued that both authorities have power over the issues relating to essential and fundamental policy of the country and both authorities ultimately reflect the will of the people.

For example, one scholar discusses the connection between the NPC's approval power and CPC's Decision making power:

Decision making represents research and analysis. Because CPC is the leader of socialism thus it possesses the decision making power (or policy making power)... However, the Decision Approval means the determination on the policy and demand for future implementation. Both CPCs decision making power and NPC's decision approval power reflects the will of the people.

xxiv

Thus, in summary most scholars although see the confusion of different authority, they ignore the conclusion on which authority is superior. Instead most scholars are trying to find reasonableness of having different authorities. They suggested that because the party constitution provides that CPC represents the overwhelming majority of the Chinese people , and NPC also represents the majority interest of the Chinese people it is impossible to have any contradictions. Furthermore, some explained that since the CPC can transmit its will into the state will through the process of law, the two authorities will not conflict with each other. As we will see in the following discussion, how CPC will transmits its party will into the state will.

3. the connection between CPC and NPC

a. Taiwanese Scholars view:

Theoretically after the open market policy, NPC had backed on its position as the highest organ of the state power^{xxv}. Moreover, CPC may have to obey and Constitution and law under the theory Rule of Law, their conduct is confined in the regime of the law. Furthermore, the government also subject to the supervision of the Law and NPC. Since the 80s when these ideals had been first proposed by Deng Xiaoping, peng zhen and repeated in various events. For most it had been recognized both in Party constitution and state constitution. However, in practice, under the national political system NPC may subject to the influence of the CPC. And CPC had expressly stated in its party constitution and various events that CPC will transmit party will into state will through the process of law.

Thus, like the Taiwanese scholar 趙建民(Chien-Min Chao) 賴榮偉(Rong-Wei Lai) mentioned in their paper "How the Principle of "leadership by party" function in the system of NPC" NPC may counterbalance the control of the CPC on some certain limited issue, such as the passage of certain laws or proposals or the appointment of certain state officials. However, CPC still hold the tight control over the election of the people's congress at all the levels.^{xxvi} To illustrate CPC's control over NPC, people referred the NPC as "rubber stamps" in China meaning that they have little real influence over the operation of the government. For example: By comparing relevant officials' ranks in the party hierarchy, we can see that the executive (State Council and local governments) is the most powerful arm of the state, while the legislature and judiciary have minor representation in the power structure, acting as tools of the party and government. That is why the Chinese political vocabulary usually refers to the state apparatus as "party-government organs" without mentioning the legislature and judiciary.^{xxvii}

b. Mainland Scholars view:

Most mainland scholars views on this topic are mainly focusing on the legitimacy of CPC's leadership in connection with the NPC and how to improve such leadership in a way not in conflict with the Rule of Law. In summary, they analysis the current practice of CPC's leadership and conclude that CPC achieved its leadership through its ideology, organization and Politics. This practice not violate law and not technically equal to the "control" of the NPC.

To illustrate their analysis, I provided their discussion on CPC's leadership here. Basically there are 3 ways to exercise this leadership, political, ideology and organization. All these ways had been recognized by state Constitution and party Constitution.

c. Political leadership

CPC maintains policy instruction to the NPC, such instruction including both principle and order. Generally, CPC is more care about the process of the laws that involves the ideology or national policies. Prior to the initial of legislation, the party organization in the standing committee of the NPC will report the guiding ideology and guiding principles of the draft to the Central committee of the CPC for approval. Laws, acts or bills that related to the important economic or administration issues shall also submit to CPC central committee for approval before proposal to the standing committee of the NPC. Other laws or bills' submission can determine in the discretion of the party organ in the NPC standing committee.^{xxviii}

d. Organization leadership: Appointment and remove an official

Another rout for CPC take control over the NPC is the power of appointing officials. Such power is highly centralized in the hands of CPC. This power is preserved by CPC though the system of "party rule the officials" For example, all chief and deputy secretaries of the NPC's standing committee at each level will subject to the supervision of the upper level standing committee or other functional department and Organization Department of the Central Committee of the CPC at each level. For example, Politics and Law Committee of CPC and party organ in the Organization Department has the power to manage the official in the department of public security and judiciary. Thus, ultimately, CPC party committee has the factual decision making power over the government and that is why people called NPC as rubber stamp.

To be specific, the exercise of "party rule the officials" and all the other CPC's power are all depends on the Organization, party organ and party headquarter, and organization's supervision.

1) The party organ and party headquarter

You can find the definition of the party organ and its main responsibility from the party constitution article 46 A leading Party members' group may be formed in the leading body of a central or local state organ, people's organization, economic or cultural institution or other non-Party unit. The group plays the role of the core of leadership. Its main tasks are: to see to it that the Party's line, principles and policies are implemented, to discuss and decide on matters of major importance in its unit, to do well in cadre management, to rally the non-Party cadres and the masses in fulfilling the tasks

assigned by the Party and the state and to guide the work of the Party organization of the unit and those directly under it. Also, article 47 provides that

The composition of a leading Party members' group is decided by the Party organization that approves its establishment. The group shall have a secretary and, if necessary, deputy secretaries.

Thus in summary, you will understand that the party organs and party headquarters are like cell phone signal station; it settled in everywhere and transmits CPC's order to the area it covered. When it comes to the NPC's legislation, CPC exercise its influence through these organs and headquarters. For example: The amendment of state constitution has to follow this process: Proposal for the act; Review and discuss the act; Pass the act; Announce the act. However, during the amendment of 1999 state constitution, the proposal of the constitution amendment was submitted to the NPC after The CPC inside discussion.

The logic behind this phenomenon is CPC member subject to the party organ and party organ subject to the party headquarter. CPC has created a big spider web that covered NPC. Prior to each meeting of the NPC in each year, CPC will reorganize this web by creating temporary CPC party group among the NPC representatives. During the process of the legislation, it is hard to have an Act that against the will of the CPC because people who has the right to bring an proposal are generally CPC member, who is subject to the control of party organ. Furthermore, CPC can make one act be passed by manipulating the schedule of the discussion group or people who participate the discussion group. CPC achieved this because its temporary party group can control its CPC members who are also the NPC representatives.

Thus, someone may say that most NPC representatives are ghost of CPC and CPC is in control of everything before and behind the veil.

2) Supervision

Party organ and Party headquarter is very handy for the control of CPC, however except for the policy instruction, CPC supervise the state organs' exercise of party's policy through the system of party committee, party organs at all levels and the system of the commission of Discipline and inspection (CDI).

In this system, the party organ is the key. It is a organization represent the senior (upper) level of the party headquarters. The members of the party organ are determined by the party committee to ensure the party organ will follow the order of the party committee. The party organ shall response for achieving party's line, principle, policy and accomplishing the task that given by the party.

There are several ways that CPC utilizes party organ to control the NPC or other state organ. First, party organ can serve the function of forwarding the party's policy and ideology, meanwhile, party organ can supervise the entity that they settled in. They will check whether that entity follow the lines of the CPC. For another part of supervision or the control is CDI. The main task of CDI is to safeguard the

dignity of the party constitution and other party regulations and inspect entity's progress in following the principle of the party. Local and grass root CDI is under dual leadership of local party committee and upper level CDI.

Thus, in summary CPC take the control over the state agency by its dual safeguarding system. CPC utilize the party organ and party headquarters to spread and forward party's policy and ensure people are following party's line. CDI doing the inspection to guarantee the party policy will not be violate by its member. Also, CPC utilizing its party organ and party headquarter to influence the NPC and NPC's legislation discussion in a way to control the process of law making. And that is how CPC interact with the NPC.

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党国体制下当与立法机构关系的若干思考

TOWARD A LEGAL ENLIGHTENMENT: Discussion in Contemporary China on the Rule of Law

Albert H.Y. Chen

A HISTORICAL INTRODUCTION

Although the term “the Rule of Law” (*fazhi*) appeared in a few official documents in the early years of the People’s Republic of China (PRC), it soon disappeared from public usage and was substituted by terms such as “revolutionary legal system” and “people’s democratic legal system.”¹ During and after the Anti-Rightist Movement of 1957, the concept of the Rule of Law was officially rejected as “bourgeois”; those who advocated the authority of the law were purged as attempting to “use the law to resist the Party.”² In the Cultural Revolution era, Mao Zedong even praised “lawlessness” as something good and positive for society and humanity.³

At the watershed Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (CCP) in late 1978, it was decided to rehabilitate the socialist legal system that had undergone a stillbirth in the 1950s. Deng Xiaoping coined a sixteen-character phrase that was to become the battle cry for legality for many years to come: “There must be laws for people to follow,

¹ This is pointed out in Gu Anliang, “A Commentary on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State,” in *Yifa zhiguo, jianshe shehui zhuyi fazhi guojia* (Ruling the Country According to Law, Constructing a Socialist Rule-of-Law State) 191 at 196-197 (Liu Hainian, Li Buyun and Li Lin, eds. 1996) (the author points out, *inter alia*, that the Work Report of the Peoples’ Courts presented at the first national conference on judicial work in 1950 called for the development of “the Rule-of-Law and moral concepts of the New Democracy” and for the courts becoming “the lecterns for propagating our country’s spirit of the Rule of Law”); Shen Zongling, “More on the Meaning of the Terms ‘Legal System’ and ‘the Rule of Law,’” 10 *Faxue* (Jurisprudence) 4 (1996); Xie Pengcheng and Liu Cuixiao, “A Review of Research in Jurisprudence in 1996,” 1 *Faxue yanjiu* (CASS Journal of Law) 3 at 4 (1997).

² See Gu, id.; Guo Daohui, “A Fundamental Change in the Mode of Rule,” in *Yifa zhiguo*, id., 109. For two decades since 1957, the expression “the Rule of Law” was regarded as embodying “bourgeois ideology.”

³ Guo, id.; Albert H.Y. Chen, *An Introduction to the Legal System of the People’s Republic of China* 28-33 (rev. ed. 1998).

these laws must be observed, their enforcement must be strict, and law breakers must be dealt with.”⁴

Since 1978, significant progress has been made to rebuild a credible set of laws and legal institutions in mainland China. Legal education and scholarship, which had been neglected for more than two decades, were also revived. Legal scholarship developed not only in areas of substantive and procedural law, but also in the field of legal theory.⁵ However, research in legal theory was more constrained by the dogma of Marxism and “forbidden zones” of political sensitivity than other branches of legal scholarship. Legal theorists trod cautiously into new fields, and setbacks were occasionally encountered. For example, after the June 4th events in 1989, there was a backlash against the “bourgeois liberalization” tendency in legal philosophy, and some of the more liberal-minded thinkers were criticized.⁶

Fortunately, the tide soon turned with Deng’s trip to southern China in 1992, and the subsequent decision of the CCP at its 14th Party Congress to move China in the direction of a “socialist market economy.” This concept, which has far-reaching theoretical and practical implications, found its way into the PRC Constitution in 1993, when the National People’s Congress (NPC) adopted a constitutional amendment on the subject.⁷ The amendment also stressed the role of economic legislation in facilitating the development of a socialist market economy, and the NPC Standing Committee developed an ambitious program at the end of 1993 to start developing an adequate legislative framework for a socialist market economy.⁸

After the inauguration of the concept of the socialist market economy, there was an outburst of enthusiasm on the part of legal scholars with the idea that the socialist market economy is a “legal system-based economy” or “rule of law economy,” the premise being that market transactions can only take place within

⁴ The words were first emphasized in the communiqué of the watershed Third Plenum of the 11th Central Committee of the Chinese Communist Party in December 1978. For further details, see Chen, *id.* at 33-35.

⁵ See, e.g., Albert H.Y. Chen, “Developing Theories of Rights and Human Rights in China,” in *Hong Kong, China and 1997: Essays in Legal Theory* 123 (Raymond Wacks, ed. 1993).

⁶ See, e.g., the 1989 volume of *Zhongguo faxue* (Chinese Legal Science), the leading law journal in mainland China.

⁷ See Chen, *supra* n. 3, at 209.

⁸ Cai Dingjian, “Towards the Rule of Law: Where is the Way?” in *Yifa zhiguo*, *supra* n. 1, 394 at 395-396.

a framework of legal rules on contract and property rights. The body of literature created by Chinese scholars on this subject has been examined elsewhere.⁹ Then there were signs that the top leadership in China had become increasingly sympathetic to this claim about the importance of law in promoting economic development. In late 1994 and 1995, the top leadership of the Party and the State attended two law lectures delivered by leading scholars on the subjects of international economic law and the legal aspects of a socialist market economy respectively.¹⁰ A climax came on February 8, 1996, when the top leaders attended a lecture given by a leading scholar at the Chinese Academy of Social Science on “the theoretical and practical issues relating to ruling the country according to law and building a socialist legal system state.”¹¹ At the end of the lecture, President Jiang Zemin delivered a widely publicized speech on the importance of “ruling the country according to law.” The speech was a lengthy one dealing with the legal doctrines in Deng Xiaoping’s thought, the relationship between law and the socialist market economy, and the need to raise the legal consciousness of officials and citizens. He concluded by pointing out that

ruling the country according to law is an important mark of social progress and the civilization of a society; it is a necessary requirement of our construction of a modern socialist state.¹²

Subsequently, when the NPC met in March 1996, it incorporated the objective of “ruling the country according to law and constructing a socialist legal system state” into its Ninth Five-Year Plan and Outline of Objectives for Long-Term Developments towards 2010.¹³ Further progress at the conceptual level was achieved when the term *fazhi guojia* (“rule-of-law state,” or *Rechtsstaat* in

⁹ Albert H.Y. Chen, “The Developing Theory of Law and Market Economy in Contemporary China,” in *Legal Developments in China: Market Economy and Law* 3 (Wang Guiguo and Wei Zhenying, eds. 1996).

¹⁰ As pointed out in *Yifa zhiguo*, supra n. 1, at 1 (extract from *Renmin ribao* (People’s Daily), February 9, 1996). Similar lectures organized for top leaders have continued to be held from time to time since 1995.

¹¹ Id.

¹² Id. at 4.

¹³ 4 *Xinhua yuebao* (New China Monthly) 19 at 37 (1996).

German) instead of the more conservative term “legal system state,”¹⁴ was used in General Secretary Jiang Zemin’s keynote address at the 15th National Congress of the Chinese Communist Party in September 1997,¹⁵ and in the Work Report of the National People’s Congress (NPC) Standing Committee presented by Mr. Tian Jiyun, Vice-Chairman of the NPC Standing Committee, to the first plenary session of the 9th NPC in March 1998.¹⁶ These developments culminated in one of the constitutional amendments adopted by the 9th NPC at its second plenary session in March 1999. This amendment introduced the following sentence at the beginning of article 5 of the Constitution of the People’s Republic of China:

The People’s Republic of China shall practice ruling the country according to law, and shall construct a socialist rule-of-law state.¹⁷

These developments have spawned a lively discussion among legal scholars in China about what is the meaning and significance of “ruling the country according to law” and “the rule of law,” and what is to be done if this is the objective to be achieved. The discussion represented the continuation and deepening of the debate among Chinese legal scholars that occurred in the early 1980s on “the rule of law” versus “the rule of men.”¹⁸ It can also be interpreted as an offshoot of the discussion dating back to 1995 on Deng’s legal thought,¹⁹ as well as the earlier discussion since 1993 on the relationship

¹⁴ The *pinyin* romanization for both “legal system state” and “rule-of-law state” is *fazhi guojia*, but in fact *zhi* corresponds to two different Chinese characters in the two expressions. The Chinese character romanized as *zhi* in the expression “legal system state” means “system,” whereas the character romanized as *zhi* in the expression “rule-of-law state” means “rule.”

¹⁵ *Collection of Documents of the 15th National Congress of the Communist Party of China* 1 at 31 (1997) (in Chinese).

¹⁶ *Collection of Documents of the 1st Plenary Session of the 9th National People’s Congress of the People’s Republic of China* 101 at 102 (1998) (in Chinese).

¹⁷ The remainder of article 5, which has existed since the Constitution was enacted in 1982, provides as follows: “The State upholds the unity and dignity of the socialist legal system. No law, administrative regulation or local regulation may contravene the Constitution. All state organs, armed forces, political parties, social organizations, enterprises and institutions shall abide by the Constitution and the law. Responsibility shall be pursued in respect of all acts that violate the Constitution and the law. No organization or individual has the privilege of being above the Constitution and the law.” (my own translation from the Chinese original)

¹⁸ See, e.g., *Fazhi yu renzhi wenti taolun ji* (Essays on the Question of the Rule of Law and the Rule of Men) (Editorial Committee for *Fazhi yu renzhi wenti taolun ji*, eds. 1981).

¹⁹ See, e.g., the 1995 volume of *Zhongguo faxue* (Chinese Legal Science).

between the market economy and the Rule of Law.²⁰ The body of literature that has appeared since early 1996 on the subject of the Rule of Law can be regarded as the most mature stage so far of modern Chinese scholarly reflections on the question of the Rule of Law. It is the purpose of this article to examine this body of literature and to evaluate it.

INTELLECTUAL RESOURCES FROM TRADITIONS

We shall begin by looking at the intellectual resources employed by contemporary Chinese thinkers when they embarked on the project of constructing a theory of the Rule of Law for present-day China. By intellectual resources I mean the heritage of intellectual history, particularly the concepts and theories developed by great thinkers in the past. In their discussions on the Rule of Law, contemporary Chinese scholars have reflected on the heritage of both the Chinese and Western traditions in this regard.

In an influential treatise published in 1922, the famous Chinese thinker Liang Qichao used the terms “the rule of men” and “the rule of law” to characterize the political and legal doctrines of Confucianism and Legalism respectively in ancient China.²¹ Contemporary Chinese scholars are almost unanimous in rejecting the alleged equivalence between Legalism and the Rule of Law. They point out that Legalism, as enunciated in the pre-Qin period and actually practiced in full during the Qin dynasty (221-207 B.C.), viewed law simply as an instrument of authoritarian and despotic rule. Law consisted of rules prescribing punishment for behavior that was considered undesirable from the ruler’s point of view. It emanated from the ruler, was designed entirely to enhance the ruler’s power, and the ruler himself was not subject to the law.

Although Legalism as an orthodox ideology was abandoned after the Qin dynasty, the ensuing amalgam of Confucianism and Legalism that survived for almost two millennia was also not conducive to the Rule of Law.²² Contemporary Chinese scholars have noted that Confucianism advocated rule by virtue and by ethics rather than by law. Rulers were expected to be virtuous

²⁰ Chen, *supra* n. 9.

²¹ For the English translation of the condensed version of this book, see Liang Chi-chao, *History of Chinese Political Thought During the Early Tsin Period* (L.T. Chen, tr. 1968, orig. 1930). See also the discussion in Gu, *supra* n. 1 at 192.

²² See generally Albert H.Y. Chen, “Confucian Legal Culture and its Modern Fate,” in Raymond Wacks (ed.), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999), 505-533.

and to behave in an exemplary manner. Scholars-officials were to act as parents of the people. Subjects were to be well educated and morally cultivated, so that they would practice the rites and norms of good conduct voluntarily and in accordance with their conscience. In situations where there were disputes, people were encouraged to compromise and give concessions rather than to assert their self-interest or rights by litigation. In the Confucian vision, social harmony rather than justice is the symbol of the ideal society.

Although it is possible to interpret the Confucian approach in a positive manner and to argue that it represented the best possible option in the kind of pre-modern society that China was, most contemporary Chinese legal scholars depict the Confucian tradition negatively as depriving persons of their autonomy, freedom, individuality and claims to equality.²³ They pointed out that traditional Chinese society was hierarchical and oppressive, most people were in positions of personal dependence on and subordination to some other persons or social groups, that the individual's rights were ignored, that the legal culture was one dominated by rulers' absolute power and subjects' unconditional obligations, and obedience to authority was over-emphasized. Some writers lamented the absence of "civil society" in historical China, and described the traditional Chinese sociopolitical structure as a monolithic one, unifying the family, clan and the political state.²⁴ Others criticized the traditional attitude of "worshipping" the state and its power.²⁵ One scholar agreed with Hegel's portrait of traditional China as a system of paternal rule where subjects were treated like children in a family.²⁶

Given this grim assessment of the heritage of Chinese civilization as far as the Rule of Law is concerned, it is not surprising that most contemporary Chinese legal thinkers instead look to the Western tradition in order to find the necessary intellectual resources for their theory of the Rule of Law. In this regard, it is noteworthy that they find much that is positive in both the legal

²³ Id.

²⁴ See, e.g., Fan Zhongxin, "Civil Society Determines the Rule-of-Law Society," in *Yifa zhiguo*, supra n. 1, 423; Du Wanhua, "The Dualistic Social Structure and Jurisprudential Reflections Thereon," 1 *Xiandai faxue* (Modern Law Science) 5 (1996).

²⁵ See, e.g., Zhou Yongkun, "Surpassing Oneself: Legal Modernization and Transformation of Legal Culture," 3 *Tianjin shehui kexue* (Tianjin Social Science) 64 (1995), reprinted in 8 *Faxue* (Science of Law) 19 (1995); Zheng Chengliang et al., "The Essence of the Jurisprudence of Ruling the Country according to Law," in *Yifa zhiguo*, supra n. 1, 126.

²⁶ Chen Duanhong, "Confrontation: The Future of Chinese Constitutionalism from the Perspective of Administrative Litigation," 4 *Zhongwai faxue* (Peking University Law Journal) 1 (1995).

philosophy of classical Greece and in the political thought of the Age of Enlightenment. Even the Middle Ages received some positive evaluation in terms of its theory of a natural or divine law that stood above positive human law,²⁷ and in terms of the legal tradition developed by the citizens of autonomous towns who epitomized civil society.²⁸

In discussing the meaning of the Rule of Law, a significant number of leading scholars in contemporary China found it useful to cite Aristotle's passage in *Politics* that the Rule of Law embraces two meanings: First, there is general compliance with the established laws, and second, the content of the law is good.²⁹ Some of them also discussed approvingly Aristotle's arguments for the Rule of Law, such as the points that law represents reason and is free of human desires and emotions,³⁰ that it restrains the exercise of arbitrary power, and that it embodies the judgment of "the many" rather than "the few."³¹ These scholars observed that such a philosophy of the Rule of Law could only flourish in the social context of the democracy of the ancient Greek *polis*, which contemporary Chinese scholars wrote about with admiration.³²

Scholars are even more enthusiastic about and receptive to the political and legal philosophy of the Enlightenment, or what they describe as the period of "the bourgeois revolutions." Contemporary Chinese literature on the Rule of Law abounds with references to the works of classical writers, such as Locke, Montesquieu and Paine, as well as subsequent exponents of the liberal tradition, including Dicey, Hayek and Fuller. It is pointed out that according to Marxism, the transition from feudalism to capitalism, which the bourgeois revolutions completed, was a kind of progress in history, and that there is much that contemporary socialist China can learn and borrow from the political and legal thought of the bourgeois revolutions.³³ Marx was cited in support of the

²⁷ Li Lin, "The Concept, Institution and Operation of the Rule of Law," in *Yifa zhiguo*, supra n. 1, 234.

²⁸ Fan, supra n. 24; Zhou Yongkun, "The Idea of the Priority of Society and the Rule-of-Law State," 1 *Faxue yanjiu* (CASS Journal of Law) 101 at 107 (1997).

²⁹ See, e.g., Gu Chunde, "Ruling the Country According to Law and the Rule of Law," in *Yifa zhiguo*, supra n. 1, 180; Gu Anliang, supra n. 1 at 192; Zhou Yongkun, supra n. 28 at 101.

³⁰ Li Lin, supra n. 27 at 235.

³¹ Li Buyun, "Ruling the Country According to Law, Constructing a Socialist Rule-of-Law State," in *Yifa zhiguo*, supra n. 1, 46 at 49-50.

³² See, e.g., Fan, supra n. 24; Zhou, supra n. 28.

³³ Gu Chunde, supra n. 29; Gu Anliang, supra n. 1; Li Lin, supra n. 27; Li Buyun, supra n. 31.

proposition that the encounter between the capitalist West and other civilizations was also a phenomenon of historical progress, and it was suggested that the experience of the legal modernization that started in the West is a common heritage of all humankind.³⁴

At the same time, Chinese scholars appreciate that the Rule of Law developed in the West as part of a dynamic historical process, undergoing distinct phases of development. Thus one scholar pointed out that the nature of the Rule of Law has changed as the West moved from the period of *laissez faire* capitalism into the period of monopoly capitalism and welfare states.³⁵ Another characterized the earlier period as “individuals-oriented” and the later period as “society-oriented.”³⁶ A third writer distinguished the two stages by using the concepts of “a hard rule-of-law” (strict legal rules with little discretion in their administration) and “a soft rule-of-law” (a “living law” administered by the exercise of discretion in search for substantive justice).³⁷

Although most Chinese scholars find the theory and practice of the Rule of Law as developed in the West highly relevant to China’s contemporary needs, some point out that the paths of legal modernization taken by the West and China have to be very different. In the West, legal institutions grew up side by side with the market economy in a spontaneous and gradual process of evolutionary change, while in contemporary China, legal as well as economic reforms have been pushed through by the state in a top-down direction.³⁸ From a macro-historical perspective, legal modernization was a result of the internal dynamics of social, economic and political development in the West, but occurred in twentieth-century China only as a response to the external challenge posed by the West. This means that legal modernization in China has to a significant extent been an exercise in legal transplant, accompanied by the

³⁴ Gong Pixiang, “Legal Modernization Does Not Equal Westernization,” 1 *Faxue* (Jurisprudence) 6 (1997).

³⁵ Zhu Jingwen, “The Rule of Law is a Historical Category,” in *Yifa zhibiguo*, supra n. 1, 292.

³⁶ Hao Tiechuan and Fu Dingsheng, “The Problems and Challenges of China’s Legal Modernization,” 7 *Faxue* (Jurisprudence) 2 (1995).

³⁷ Yan Cunsheng, “The Modernization of Legal Ideas,” in *Fazhi xiandaihua yanjiu* (Studies on Legal Modernization), vol. 2, 197 (Legal Modernization Research Center, Nanjing Normal University, ed. 1996).

³⁸ Su Li, *Fazhi ji qi bentu ziyuan* (The Rule of Law and Its Indigenous Resources) 11 (1996).

persistent problem of a gap between local social reality and the imported legal doctrines and norms.³⁹

THE DEVELOPING THEORY OF LAW

The Meaning of the Rule of Law

We now begin our survey of the contours of the developing theory of the Rule of Law in contemporary China. The first question to be considered is how do scholars understand the concept of the Rule of Law. Here there seems to be a consensus that the Rule of Law connotes the binding authority of democratically generated law on both subjects (citizens) and rulers (government), and submission to such law on the part of all members of the community, including the most senior government officials.⁴⁰ Many scholars stressed the intrinsic connection between democracy and the Rule of Law in the modern sense.⁴¹ The law that rules in a state subject to the Rule of Law is the people's law and not the ruler's law as in pre-modern states. While the ruler's law was often imposed by force on the people, the people's law is a product of the people's rational consent to its authority. Through such law, the people establish the government and authorize it to exercise certain powers which are conferred, regulated and limited by law.

Contemporary Chinese theorists associate the Rule of Law with other liberal values such as liberty, equality, human rights, separation of powers, checks and balances and judicial independence. The functions of law in protecting citizens' rights, controlling the exercise of state power and preventing its abuse are particularly emphasized. These theorists point out that although laws often exist in situations of the "rule of men" (rather than the Rule of Law), the difference between the Rule of Law and the rule of men is that in the former case, authority is depersonalized, and where a conflict arises between the authority of the law and the authority of a powerful political leader, the law will

³⁹ Jiang Lishan, "An Analysis of the Characteristics of the Project of Chinese Legal Modernization," 4 *Zhongguo faxue* (Peking University Law Journal) 10 (1995).

⁴⁰ Zhou Yongkun, "A Commentary on the Conference on the Theory of Ruling the Country according to Law and Constructing a Socialist Rule-of-Law State," 2 *Fazhi yu shehui fazhan* (Legal System and Social Development) 1 (1997); Zheng Chengliang et al., "The Essence of the Jurisprudence of Ruling the Country according to Law," in *Yifa zhiguo*, supra n. 1, 121; Fan, supra n. 24.

⁴¹ Bei Yue, "The Theoretical Basis of Ruling the Country According to Law," in *Yifa zhiguo*, supra n. 1, 143; Gu Chunde, supra n. 29; Xie Pengcheng, "Legal Authority in Contemporary China," 6 *Zhongguo faxue* (Chinese Legal Science) 3 (1995).

prevail.⁴² One writer derives two basic principles from the notion of the Rule of Law: First, agencies of public power may not do anything that is not expressly authorized by law. Second, persons exercising private rights may do whatever is not expressly prohibited by law.⁴³

Some thinkers find in the notion of reason or rationality the essence of the Rule of Law.⁴⁴ It is pointed out that the Rule of Law implies a rational way of doing things, a rational legal system, a rational legal spirit and a rational social order.⁴⁵ Rationality includes formal rationality and substantive rationality. The former refers primarily to the process of law enforcement, and requires like cases to be treated alike and legal rules to be administered in a predictable manner. Substantive rationality refers to the content of the law, as well as the objectives to be achieved by the law, the values embodied in it and the consequences of its operation.⁴⁶

The Ingredients of the Rule of Law

Some scholars further explore the different elements, aspects or levels within the concept of the Rule of Law. The following is a sample of the more influential views:

- (a) A distinction can be drawn between the formal and substantive ingredients of the Rule of Law. The formal ingredient is the supremacy of the law (the law being made by the people and being binding on the people as well as the government), whereas the substantive ingredient relates to whether the content of the law is good and protects the people's rights.⁴⁷

⁴² Zheng et al., *supra* n. 40.

⁴³ Liu Zuoxiang, "Two Rule-of-Law Principles to be Adhered to in Order to Realize the Rule of Law," 3 *Falü kexue* (Law Science) 19 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 25 (1996).

⁴⁴ Yan, *supra* n. 37; Sun Xiaoxia, "The Choice of Realistic Objectives for the Rule of Law in China," 3 *Falü kexue* (Law Science) 12 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 18 (1996).

⁴⁵ Sun Xiaoxia, "The Rule of Law, Rationality and Cost," 1 *Fazhi yu shehui fazhan* (Legal System and Social Development) 1 (1997).

⁴⁶ See the works cited in *supra* n. 44.

⁴⁷ Zhou, *supra* n. 40. See also the more elaborate theorization of the Rule of Law in the formal and substantive senses in Xu Xianming, "The Ingredients of the Rule of Law," 3 *Faxue yanjiu* (CASS Journal of Law) 37 (1996); Gao Hongjun, "Two Modes of the Rule of Law," in *Yifa zhiguo*, *supra* n. 1, 262.

- (b) There are three levels of the Rule of Law. First, there is the Rule of Law in an ideal sense. Second, there is the Rule of Law as prescribed by a particular system of legal norms. Third, there is the Rule of Law as actually practiced in a society—the reality of the existence (or non-existence) of the Rule of Law.⁴⁸
- (c) Some writers point out that the implementation of the Rule of Law depends on coordinated efforts on many fronts simultaneously, such as law-making, development of democracy and of institutions for supervising the exercise of power and the protection of rights, effective law enforcement, judicial independence, improvements in judicial procedures and the professional standards of judges, and raising people's legal consciousness.⁴⁹

The Distinction Between “Legal System” and “Rule of Law.”

As mentioned in the first section of this article, an official slogan adopted by the NPC in 1996 in the Ninth Five-Year Plan and Outline of Objectives for Long-Term Developments towards 2010 is “ruling the country according to law and constructing a socialist legal system state.” Since then, the term “rule of law” has also received official, and, in 1999, constitutional recognition. What then is the difference between the two Chinese terms, which are both romanized as *fazhi*?

Scholars' understanding of the meaning of the “rule of law” has been discussed above. The problem with the term “legal system,” which has been used (for example, in the call for “strengthening the socialist legal system”) to the exclusion of “Rule of Law” for many years in the PRC, is that it may be interpreted to mean “rule by law” rather than “rule of law.” Rule by law implies that law is merely an instrument that the state uses for the purpose of ruling the people. On the other hand, the Rule of Law requires the democratization of law and the legal institutionalization of democracy.⁵⁰

Thus it is pointed out that while all organized states have legal systems, not all of them practice the Rule of Law.⁵¹ There was also an interesting discussion

⁴⁸ Wu Dexing, “The Theoretical Mode and Process of Realization of the Rule of Law,” 5 *Faxue yanjiu* (CASS Journal of Law) 97 (1996); Li Lin, *supra* n. 27.

⁴⁹ Li Buyun, *supra* n. 31; Xu, *supra* n. 47; Zhou, *supra* n. 40 at 15.

⁵⁰ See, e.g., Guo Daohui, “A Fundamental Change in the Mode of Rule,” in *Yifa zhiguo*, *supra* n. 1, 109. For more in-depth research, see generally Guo Daohui, *Fa de shidai jingshen* (The Contemporary Spirit of Law) (1997); Guo Daohui, *Fa de shidai huanan* (Epochal Call for Law) (1998); Li Buyun, *Zouxiang fazhi* (Toward the Rule of Law) (1998).

⁵¹ Li Buyun, *supra* n. 31; Zhou, *supra* n. 40 at 12-14.

about who is the subject for the phrase “ruling the country according to law”—who rules the country according to law? Some scholars made the point that it is the people who rule the country according to law, by making law and entrusting to the government the necessary public administrative powers. As far as the government is concerned, the related slogan “using the law to rule the country” (*yifa zhi guo*) is sometimes used, but this slogan is inadequate by itself because it again connotes rule by law rather than rule of law. Therefore, the full notion of the Rule of Law can only be expressed by combining the concepts of (a) the people using law to rule the country (by legally establishing the state and entrusting legal powers to it); and (b) the government (acting under legal authorization by the people) administering the country according to law.⁵²

Socialism and the Rule of Law

The next question to be considered is how contemporary Chinese scholars have shifted away from the former official position that the Rule of Law was a bourgeois concept, and how they now reconcile it with socialism and Marxism. Here a leading scholar employs an analogy with Deng Xiaoping’s view that the market economy does not equal capitalism, and it is possible to have a market economy under socialism. Hence it is also said that the Rule of Law is not the monopoly of capitalism, and a socialist Rule of Law is also practicable and desirable.⁵³ Like the market economy, the Rule of Law is now understood as a product of the historical development of civilization and as part of the common heritage of humankind.⁵⁴

Relying on the Marxist view of historical progress from “slave society to feudalism to capitalism to socialism,” some Chinese scholars argue that the Rule of Law in capitalism is superior to legal systems under feudalism, and socialist Rule of Law is a still higher stage of legal evolution compared to the Rule of Law under capitalism.⁵⁵ The socialist project is one of human emancipation; socialism enables human beings to develop themselves to the full. While the Rule of Law under capitalism masks the reality of class oppression and

⁵² Guo Daohui, “A Fundamental Change,” *supra* n. 50; Zhou, *supra* n. 40 at 12; Zhou, *supra* n. 28.

⁵³ Liu Shengping, “The Implementation of the Rule of Law is Inevitable in Historical Development,” 10 *Faxue* (Jurisprudence) 4 (1996); Gu Anliang, *supra* n. 1 at 194.

⁵⁴ Liu, *id.*

⁵⁵ Li Lin, *supra* n. 27 at 242-243.

capitalist law primarily serves the interest of capital, socialist law reflects the will and interest of all people in society, and socialist Rule of Law secures the richest degree of freedom, equality and rights.⁵⁶

What, then, are the features specific to socialist Rule of Law? Most scholars stress that it rests on the foundation of the predominance of public ownership of the means of production in society, and that it adheres to the fundamental principle of the leadership of the Communist Party.⁵⁷ This means that certain elements of bourgeois Rule of Law, such as the inviolability of private property or political pluralism in the form of multi-party politics, cannot have any place in socialist Rule of Law.⁵⁸

The Nature of Law

Since the 1980s, the debate about the nature of law has never ceased within the circle of legal philosophers in China.⁵⁹ The point of departure for this discussion was the orthodox view, imported from the Soviet Union in the 1950s, that law reflects the will of the ruling class, which in turn is based on the conditions of material life of that class. Such will is elevated to the will of the state through the legislative process. The law that emanates from this process is then a set of behavioral norms backed up by the coercive power of the state.

The continuing debate has been about whether this description or explanation of law in terms of its “class nature” (*jieji xing*) is correct and adequate, and the extent, if any, to which law also has a “social nature” (*shehui xing*)—in the sense that it responds to the common interests, needs and aspirations of all members of society.⁶⁰ The recent discussion on the Rule of Law has contributed significantly to this ongoing debate.

⁵⁶ Id; Zhou, *supra* n. 40 at 14; Zhou, *supra* n. 28 at 102; Wang Jiafu et al., “On Ruling the Country According to Law,” in *Yifa zhiguo*, *supra* n. 1, 6 at 11; Ye Feng and Xie Pengcheng, “From ‘Having Laws to Follow’ to ‘Strict Enforcement of the Law,’” paper presented at the annual conference of the Legal Theory Research Society of the Chinese Society of Legal Science, Shenzhen University, Shenzhen, November 5-8, 1996.

⁵⁷ Li Lin, *supra* n. 27 at 243-244; Lü Shilun and Peng Hanying, “The Economic Point of Departure of the Rule of Law,” in *Fazhi xiandaihua yanjiu*, *supra* n. 37, 1; Wang et al., *supra* n. 56 at 11; Zhu, *supra* n. 35 at 301.

⁵⁸ Zhu, *id.* at 301-302.

⁵⁹ See, e.g., Ronald C. Keith, “Chinese Politics and the New Theory of ‘Rule of Law,’” 125 *China Quarterly* 109 (1991).

⁶⁰ See generally Chih-yu Shih, “China’s Socialist Law Under Reform: The Class Nature Reconsidered,” 44 *American Journal of Comparative Law* 627 (1996).

For example, one scholar, who himself works under the Standing Committee of the NPC, states unequivocally his view that the traditional notion of law as the will of the ruling class and an instrument of class dictatorship is inconsistent with the concept of the Rule of Law and the requirements of the market economy.⁶¹ Indeed, a substantial body of scholarly opinion has accumulated in China in recent years that law serves the functional needs of society in terms of coordination of different kinds of interests, regulation of social relationships and providing order and predictability in human affairs (instead of the orthodox view that law is used to suppress class enemies). In this sense law serves the common good of all members of society, expresses the values that they uphold and responds to their needs. The content of law is very much a product of human experience accumulated over many generations, and is inseparable from notions of reason, justice, conscience and morality.⁶²

Accompanying this “new view” of law are two sets of critique of ideas associated with the “traditional” or “orthodox view.” One is a critique of the instrumental view of law. Increasingly, writers now recognize that law is not merely a means for achieving political and policy ends, but can be understood as a value and an end in and of itself because it expresses the values, needs and aspirations of the community and reflects the ideals of reason, liberty and equality.⁶³ The second critique is directed against the state-centered view of law. Scholars now stress that the existence of law preceded the rise of states and class rule. The origin of law lies in the customs and conventions that evolve spontaneously in the course of social interaction. When they gain general acceptance and are perceived to be binding on members of the community, they acquire the force of law.⁶⁴

⁶¹ “Notes on the Conference on *Ruling the Country According to Law and the Construction of Spiritual Civilization*,” 3 *Faxue yanjiu* (CASS Journal of Law) 3 at 16 (Cai Dingjian’s speech) (1997).

⁶² Zheng Chengliang et al., *supra* n. 40 at 125; Zhou, *supra* n. 28; Su Li, *supra* n. 38 at 6-10; Ma Changshan, “Understanding the Nature of Law from the Perspective of Civil Society Theory,” 1 *Faxue yanjiu* (Studies in Law) 41 (1995); “Notes,” *supra* n. 61 at 12-13 (Shi Taifeng’s speech).

⁶³ Shen Zongling, “Ruling the Country According to Law, Constructing a Socialist Legal-System State,” 6 *Beijing daxue xuebao: zhesheban* (Peking University Journal: Philosophy and Social Science Section) 4 (1996), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 8 (1997); Xie Hui, “On Legal Instrumentalism,” 1 *Zhongguo faxue* (Chinese Legal Science) 50 (1994); Zheng et al., *supra* n. 40 at 124-126.

⁶⁴ Zhou, *supra* n. 28; Yan, *supra* n. 37; Mi Jian, “Looking at the Nature of Law from the Perspective of Human Nature,” 1 *Falü kexue* (Law Science) 3 (1997), reprinted in 4 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 8 (1997); Sun Xiaoxia, “The External Authority and Internal Authority of Law,” 4 *Xuexi yu tansuo* 85 (1996), reprinted in 9 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 14 (1996).

The Functions of the Rule of Law

In contrast with the situation in the early 1980s, when there existed different schools of thought regarding whether the Rule of Law was the best mode of rule relative to other alternatives, there is now a clear consensus among Chinese legal scholars in favor of the Rule of Law. They have articulated various reasons and arguments regarding why the Rule of Law is desirable and how it can make a useful contribution to China. For example, they note that the Rule of Law facilitates the operation of the socialist market economy and is conducive to the development of socialist democracy.⁶⁵ It is also an important element of “spiritual civilization” (*jingshen wenming*).⁶⁶ Most important of all, it is the key to the long-term stability and prosperity of the nation, and will enable China to escape from its historical dynastic cycles in which each powerful regime ultimately declined and fell.⁶⁷

Other interesting points have also been made. Some scholars use the “new institutional economics” to explain how the Rule of Law can reduce transaction costs and facilitates market expansion.⁶⁸ Others point out that modernization releases people from their traditional familial, clan and social linkages and forms a society of isolated individuals, in which the law will have to play an increasingly important role as a medium for social interaction and as the most authoritative norms of behavior.⁶⁹ Social and economic change in contemporary China has led to a declining role for administrative, party and ideological means of social control, and has resulted in increased differentiation and diversity of interests and values in society.⁷⁰ The demand for legal coordination and regulation increases accordingly.⁷¹ It has also been argued that settlement through the legal system of conflicts generated by the increasing

⁶⁵ Wang et al., *supra* n. 56; Zhou, *supra* n. 40.

⁶⁶ See the section below of this article on “the rule of law and spiritual civilization.”

⁶⁷ Liu Zuoxiang and Xiao Zhoulun, “Jumping Out of the ‘Periodic Cycle’ by Relying on Democracy and the Rule of Law,” 2 *Zhongguo faxue* (Chinese Legal Science) 7 (1995).

⁶⁸ Liu Yunlong and Li Min’e, 3 *Xiandai faxue* (Modern Law Science) 96 (1996), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 31 (1997).

⁶⁹ Gao, *supra* n. 47 at 262; Long Fu and Yan Ping, “Notes on the Conference on the Rule of Law and Spiritual Civilization,” 2 *Faxue* (Jurisprudence) 61 (1997).

⁷⁰ See also the section below on “the social basis of the rule of law.”

⁷¹ Hu Yunteng, “Several Questions Relating to the Rule of Law,” in *Yifa zhiguo*, *supra* n. 1, 156; Xie Hui, “The Rule of Law: The Dominant Value Orientation for the Spiritual Transformation of the Chinese People,” 3 *Zhengzhi yu falü* (Political Science and Law) 29 (1995).

social contradictions in China can prevent the escalation of such conflicts into social unrest.⁷²

The Authority of Law and Faith in Law

If law is to perform these important functions which society assigns to it, it must have sufficient authority first. Hence many contemporary Chinese scholars emphasize that the supreme binding authority of the law lies at the core of the notion of the Rule of Law. They point out that a crucial aspect of the supremacy of the law is that “law” rather than “power” must be the ultimate source of political legitimacy. In the traditional Chinese state, there was “worship of power,” and any act or decision of a politically powerful person was automatically legitimate. However, in the eyes of modern Rule of Law, power has no legitimacy unless there exists a legal basis for it.⁷³

Some scholars study the connection between the supremacy of law and its autonomy. They rely on the American legal philosopher Roberto Unger’s analysis of the autonomy of law as consisting of four components—substantive, institutional, methodological and occupational autonomy.⁷⁴ Other scholars theorize that the authority of the law consists of external and internal aspects.⁷⁵ The external authority of the law depends on its coercive enforcement by the state. On the other hand, the internal influence of the law depends on its content and quality (whether it is good, just and consistent with people’s interests), and whether the people believe in, accept and voluntarily comply with it.

The concept of the internal authority of the law leads to the interesting discussion among contemporary Chinese jurists about “faith in law.” A significant number quote American law professor Harold Berman’s view that without faith in the law, the law is merely dead dogma; law must be believed in,

⁷² Gu Peidong, “Several Questions Relating to the Development of the Legal System in China,” in *Fazhi xiandaihua yanjiu*, supra n. 37, 16 at 27-29.

⁷³ Zheng et al., supra n. 40 at 126-127.

⁷⁴ Gao, supra n. 47 at 266-267.

⁷⁵ Sun, supra n. 64; Qiao Keyu and Gao Qicai, “On the Authority of Law,” paper presented at the 1996 Shenzhen conference, supra n. 56.

otherwise it is empty.⁷⁶ They develop this idea further and elaborate on the meaning and significance of faith in the law. Such faith means that people not only understand the law, but respect it, trust it and rely on it for the purpose of defending their interests.⁷⁷ It is also an attitude of fidelity to law, a commitment to uphold its values and principles, which manifests itself when people feel strongly about and fight against violations of the law, even to the point of sacrificing themselves in order to defend the law and its values and principles.⁷⁸

Hence it is pointed out that faith in the law is not only a matter of knowledge; it is also a matter of emotions and the will. It is a sublimation of law” reason and passion, or what a scholar describes as “rationalized passion and passionized reason.”⁷⁹ “After Marxist jurisprudence has taken off the overcoat of law’s mystery and destroyed the myth of the sanctity of the law, we must re-establish people’s faith in the law.”⁸⁰ Another scholar refers approvingly to the German legal philosopher Jhering’s affirmation of the psychological attitude of actively fighting for one’s rights (which means fighting to uphold the law), and his view that the cultivation of “legal feelings” (the right feelings towards the law) among citizens is one of the most important elements of civic education.⁸¹

The Social Basis of the Rule of Law

Another area that scholars explore as they attempt to develop a theory of the Rule of Law for China is the social basis of law. Here they rest their hope for the future of the Rule of Law on the developing market economy. As one writer puts it, “the market economy is the soil for the rule of law.”⁸² Scholars note that the actors in the market economy are autonomous and free subjects

⁷⁶ Sun, id; Zhao Zhenjiang and Fu Zitang, “The Functions of Law and Ruling the Country according to Law,” 2 *Faxue* (Jurisprudence) 12 at 14 (1997); Zhou Yezhong, “The Supremacy of the Constitution: The Soul of China’s Path to the Rule of Law,” 6 *Faxue pinglun* 1 (1995), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 9 (1996); Liu Wanghong, “Faith in Law and Legal Modernization,” in *Fazhi xiandaihua yanjiu*, supra n. 37, 226 at 228.

⁷⁷ Sun, supra n. 64; Xie, supra n. 71; Li Youxing, “Research on the Problems and Solutions of Chinese Legal Modernization,” 2 *Hangzhou shehui kexue* 73 (1997), reprinted in 4 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 21 (1997).

⁷⁸ Zhao and Fu, supra n. 76; Liu Wanghong, supra n. 76.

⁷⁹ Liu Wanghong, id. at 234 (my own translation).

⁸⁰ Id. at 227.

⁸¹ Yan, supra n. 37 at 207-210.

⁸² Cai Dingjian, “Legal Evolution and the Transformation of the Chinese Legal System,” 5 *Zhongguo faxue* (Chinese Legal Science) 3 at 7 (1996).

competing to further their own interests (which form the basis of legal consciousness and legal rights), and this generates a demand for fair legal rules to govern their dealings with one another.⁸³

Two concepts have also been introduced in the discussion for the purpose of elucidating the nature of the social change that China is undergoing and its significance for the Rule of Law. They are the concepts of interest pluralism and civil society. Under the centrally planned economy and rigorous ideological control of pre-reform socialist China, plural interests in society were hardly allowed to exist or hardly recognized. However, economic reforms since 1978 have led to differentiation of social interests, which some scholars believe to be the most important social issue in contemporary China.⁸⁴ For example, there are now different regional interests and occupational interests, as well as conflicting interests among different income strata and between urban and rural residents. It is pointed out that interest pluralism in society provides the social basis for a Rule of Law society.⁸⁵ There is a crucial role for law to play in coordinating, integrating and protecting the multifarious interests in society.⁸⁶ Indeed, it is from society itself, rather than the state, that the strongest demand for the Rule of Law comes.⁸⁷

This logically leads to the second concept mentioned above, that of civil society. The interest in the concept of civil society in contemporary China originated from scholars of social theory,⁸⁸ and soon the concept also attracted the attention of legal philosophers. Civil society is understood as a non-governmental or private realm of social life in which autonomous persons freely and voluntarily enter into dealings and interactions with one another for their own purposes.⁸⁹ Some contemporary Chinese scholars emphasize that the

⁸³ Id.

⁸⁴ Xie Hui and Cao Rong, "Interest Differentiation in Contemporary China and its Legal Regulation," 1 *Faxue* (Jurisprudence) 13 (1997).

⁸⁵ Huang Jianwu, "Pluralism of Subjects of Interests and the Social Foundation of the Rule of Law," 11 *Faxue* (Jurisprudence) 5 (1996).

⁸⁶ Xie and Cao, *supra* n. 84; Benkan pinglunyan (this journal's commentator), "Strengthening Research on the Effect on Law of Pluralism of Subjects of Interests," 7 *Faxue* (Jurisprudence) 2 (1996).

⁸⁷ Huang Jianwu, *supra* n. 85.

⁸⁸ See, e.g., Deng Zhenglai, *Guojia yu shehui: Zhongguo shimin shehui yanjiu* (State and Society: Studies on Chinese Civil Society) (1997).

⁸⁹ Liu Wujun, "Civil Society and the Spirit of Modern Law," 8 *Faxue* (Jurisprudence) 28 (1995), reprinted in 11 *Faxue* (Science of Law) (Renmin University reprint service) 22 (1995).

distinction between civil society and the (political) state is recognized in the writings of Marx.⁹⁰ Others trace the evolution of civil society back to medieval European towns.⁹¹

It is pointed out that in pre-reform, socialist China, state and society were fused together into a monolithic whole.⁹² Now economic reforms have ushered in a dual structure of political state and civil society.⁹³ Some scholars express the same idea using alternative vocabulary, such as the transition from an officials-oriented system to a people-oriented system,⁹⁴ or from a state-centered structure to a society-centered structure.⁹⁵

What, then, is the relationship between civil society and the Rule of Law? Some contemporary Chinese scholars believe that civil society is the source of and the motivating force behind the Rule of Law.⁹⁶ Others see the Rule of Law as being generated by the reciprocal interaction between civil society and the political state.⁹⁷ A leading theorist of the relationship between law and civil society argues that civil society is the cradle of the Rule of Law and embodies the spirit of modern law, which he understands to be the spirit of private law. Private law upholds equality, freedom and private rights, and these have been the products of civil society.⁹⁸

The Theoretical Presuppositions of the Rule of Law

It is interesting to observe that there has been an active reception in China in recent years not only to the vocabulary of the Rule of Law and related notions in the Western liberal tradition, but also to the deeper theoretical underpinnings of these notions. Two scholars at the Chinese Academy of Social Science have identified the theoretical basis of the Rule of Law in the form of four

⁹⁰ Du, *supra* n. 24; Ma, *supra* n. 62.

⁹¹ Fan, *supra* n. 24; Liu Wujun, *supra* n. 89.

⁹² Guo, *supra* n. 2; Xie, *supra* n. 41; Liu, *supra* n. 89.

⁹³ Du, *supra* n. 24; Liu, *supra* n. 89.

⁹⁴ Hao Tiechuan, "A Major Transformation in Rule-of-Law Thinking," 3 *Zhongguo faxue* (Chinese Legal Science) 12 (1996).

⁹⁵ Cai, *supra* n. 82.

⁹⁶ Fan, *supra* n. 24; "Notes," *supra* n. 61 at 12-13 (Shi Taifeng's speech).

⁹⁷ Xie Pengcheng, *supra* n. 41; Ma, *supra* n. 62.

⁹⁸ Liu Wujun, *supra* n. 89; Liu Wujun, "A Jurisprudential Perspective on Civil Society," 6 *Zhongwai faxue* (Peking University Law Journal) 30 (1995).

concepts: the natural autonomy and equality of human beings; lawmaking as the rational self-regulation of human beings; the evil propensity in human nature; and the superior wisdom of the masses (“the many” as distinguished from “the few”).⁹⁹ Another scholar from Peking University has developed a similar formulation consisting also of four elements: the effective control of the weakness in human nature; the rational governance of the social order; the recognition of the masses’ intelligence; and justice as the unity of fairness and efficiency.¹⁰⁰

The Due Process of Law

As mentioned above in relation to the discussion of the meaning of the Rule of Law, some Chinese scholars draw a distinction between the formal and substantive rationality of the law. One view is that at this stage in the development of the Chinese legal system, formal rationality should be particularly emphasized.¹⁰¹ The idea of formal rationality is associated with that of just procedure, procedural justice, formal justice or the due process of law. Many contemporary Chinese scholars point out that in traditional Chinese culture as well as previous legal practice in the PRC, procedural justice was much neglected and regarded as of secondary importance compared to substantive justice, and that this approach ought to be changed.¹⁰² A number of scholars quoted the famous American Supreme Court Justice Felix Frankfurter, who said that the history of liberty is one of observing procedural safeguards.¹⁰³ Another Western judge was also cited for the proposition that it is procedure that distinguishes between the Rule of Law and the arbitrary rule of men.¹⁰⁴

The leading theorist of the Rule of Law as a matter of procedure came from the CCP Central Policy Research Unit.¹⁰⁵ He argues that the basic principle of

⁹⁹ “Notes on the Conference on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State,” 3 *Faxue yanjiu* (CASS Journal of Law) 3 at 8 (Zhang Hengshan’s speech) (1996); Bei Yue, *supra* n. 41.

¹⁰⁰ Zheng Qiang, “The Value Foundations of the Rule of Law,” paper presented at the 1996 Shenzhen conference, *supra* n. 56.

¹⁰¹ Sun Xiaoxia, *supra* n. 44.

¹⁰² Cai, *supra* n. 82; Li Youxing, *supra* n. 77.

¹⁰³ Zhou Yezhong, *supra* n. 76; Wu Dexing, “The Theoretical Mode and Process of Realization of the Rule of Law,” in *Yifa zhiguo*, *supra* n. 1, 353 at 359.

¹⁰⁴ Zhou, *id.*

¹⁰⁵ Wu Dexing, *supra* n. 103 at 353.

the Rule of Law is the procedural principle that justice should be realized through fair procedures. He draws heavily on Rawls' theory of formal justice, and quotes Western thinkers' views that law is procedure, and just procedure is the primary meaning of the due process of law that stands at the heart of Western constitutionalism.¹⁰⁶ In his view, the realization of the Rule of Law is a process moving "from substance to procedure." He advocates the "proceduralization of the rule of law," which consists in the "proceduralization of law" and the "legalization of procedure."

Judicial independence

For two decades before 1978, the principle of judicial independence, or what the 1954 Constitution of the PRC called the independent exercise of adjudicatory power, was officially rejected as bourgeois and inconsistent with the principle of the leadership of the Communist Party.¹⁰⁷ After 1978, the principle of the independent exercise of the powers of the courts was rehabilitated and stipulated in the 1982 Constitution. In the recent discussion about the Rule of Law, many scholars have continued to call for judicial independence.

These scholars stressed that judicial independence is a fundamental ingredient of the Rule of Law.¹⁰⁸ It is important both to ensure the predictability and security in economic transactions, which the market economy needs, and to guarantee the protection of citizens' rights.¹⁰⁹ The Rule of Law requires the government to be subject to the law, and only independent courts can enforce the law against the government and serve as the arbiter between citizens and government.¹¹⁰

One scholar quotes approvingly Ronald Dworkin's language that courts are the capital of the law's empire, and judges its aristocracy.¹¹¹ Another scholar tries

¹⁰⁶ Id. at 359.

¹⁰⁷ See generally Chen, *supra* n. 3, 117-119.

¹⁰⁸ Li Buyun, *supra* n. 31 at 68; Li Jingbing, "Judicial Independence is Conducive to the Construction of the Rule of Law," 3 *Falü kexue* (Law Science) 15 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 21 (1996); Chen Jinzhao, "A Technical Choice in the Path of the Rule of Law," 3 *Falü kexue* (Law Science) 16 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 22 (1996).

¹⁰⁹ Xie Pengcheng, *supra* n. 41.

¹¹⁰ Cai, *supra* n. 8 at 409.

¹¹¹ Ye and Xie, *supra* n. 56, at 5.

to explain that the practice of judicial independence is not inconsistent with the principle of the leadership of the Communist Party. The Party exercises leadership in governmental affairs, including judicial affairs, by formulating general policies, promoting them through education and propaganda, and by determining appointments to official posts. However, it would be wrong for Party organs or officials to interfere with a court's work in individual cases.¹¹²

The Communist Party and the Rule of Law

What, then, are the implications of the Rule of Law for the Communist Party? Many scholars explain that the Rule of Law does not detract from the principle of Party leadership in the state. In relation to lawmaking, the Party's role is to organize and lead the people in forming their common will, and then elevating such will into law through the democratic procedure of legislation.¹¹³ The law that emerges from this process is thus the unity of the Party's policies, the people's wishes and the will of the State.¹¹⁴

After the law has been made, the Party should also lead the people in observing the law and in supervising the exercise of legal powers by state organs.¹¹⁵ The Party itself should operate within the framework of the constitution and law of the state, as provided for in the Constitution of the CCP. The PRC Constitution also requires all political parties, social bodies and individuals to comply with the Constitution and the law.¹¹⁶

It is noteworthy that not all scholars believe that the issue of the relationship between the Party and the law has been completely resolved even at the theoretical level.¹¹⁷ For example, they point out that although the personnel and operations of Party organs are financed by the state budget, these organs are not regulated by state law.¹¹⁸ The question of the extent to which the Party

¹¹² Li Buyun, *supra* n. 31 at 68-69.

¹¹³ *Id.* at 65; Xie Pengcheng, *supra* n. 41.

¹¹⁴ Li Lin, *supra* n. 27 at 247.

¹¹⁵ Guo, *supra* n. 2 at 120; Sun Guohua, "Ruling the Country According to Law is Needed for the Purpose of Improving and Strengthening Party Leadership," 10 *Faxue* (Jurisprudence) 6 (1996).

¹¹⁶ See art. 5 of the P.R.C. Constitution and the discussion in Gu Anliang, *supra* n. 1 at 195-196.

¹¹⁷ Zhou Yezhong, *supra* n. 76.

¹¹⁸ Hao Tiechuan, "Ten Suggestions Regarding Ruling the Country according to Law," 5 *Faxue* (Jurisprudence) 2 (1996).

as an organization should come under the legal control of the state cannot be avoided at some future point in the reform of the Chinese political system.¹¹⁹

Constitutionalism and the Rule of Law

The subject of constitutionalism has been brought into the Chinese discussion of the Rule of Law in recent years. Some scholars are of the view that having the Rule of Law is not sufficient; there should also be constitutionalism, and the Rule of Law is an important element of constitutionalism, which also entails the sovereignty of the people, the separation of powers, democratic government, judicial review, human rights protection, legal control of the armed forces, etc.¹²⁰ Another view is that the Rule of Law *is* constitutionalism, and the supremacy of law means first of all the supremacy of the constitution.¹²¹ One scholar stresses that the division of power is the key to constitutionalism, and identifies the orthodox view that sovereignty is non-divisible as a conceptual obstacle to the constitutional division of power in China.¹²²

In discussing the supremacy of the constitution, some scholars point out that in practice the status and force of the Chinese Constitution is worse than other ordinary laws, because the doctrine still prevails that the provisions of the Constitution are not justiciable and directly enforceable in the courts.¹²³ It is now advocated by some that constitutional provisions, particularly those guaranteeing citizens' rights, should be made judicially enforceable.¹²⁴ Others suggest the establishment of a general system of review of the constitutionality

¹¹⁹ Zhuo Zeyuan, "The Past and Future of the Rule of Law in China," paper presented at the 1996 Shenzhen conference, *supra* n. 56; Jiang Lishan, "The Basic Framework for China's Legal (Rule-of-Law) Reform and the Steps for its Implementation," 6 *Zhongwai faxue* (Peking University Law Journal) 1 (1995).

¹²⁰ Cai, *supra* n. 61.

¹²¹ Zhou Yezhong, *supra* n. 76.

¹²² Zhou Yongkun, "Separation of Powers: The Point for Strategic Breakthrough for the Rule of Law in China," 3 *Falü kexue* (Law Science) 17 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 23 (1996).

¹²³ Zhou Yezhong, *supra* n. 76.

¹²⁴ Zhou Yongkun, "The Direct Effect of Basic Constitutional Rights," 1 *Zhongguo faxue* (Chinese Legal Science) 20 (1997); Liu Liantai, "A Positivist Analysis of and Commentary on the Direct Application of Constitutional Norms in the course of Adjudication in China," 6 *Faxue yanjiu* (CASS Journal of Law) 13 (1996).

of laws, administrative regulations and local regulations, which can take the form, for example, of a constitutional committee under the NPC.¹²⁵

One scholar sees the enactment and implementation of the Administrative Litigation Law 1989 as an extremely important breakthrough in the development of constitutionalism in China.¹²⁶ The legal drama of administrative litigation enables the subject (citizen), for the first time in Chinese history, to confront the state and its officialdom as an autonomous person with a legitimate private interest, and to enter into a dialogue with the state as his or her equal. This is a revolutionary development in Chinese political culture, under which the individual always had to “kneel before the shadow of the state,”¹²⁷ which was always omnipotent, and the idea of the subject suing the official (*min gao guan*) was as unthinkable as that of the son suing the father.¹²⁸ This scholar believes that the system and experience of administrative litigation now educate the citizen with the idea that he or she is a subject with rights, and this fact has begun to re-configure the psychological structure of the Chinese people.

ALTERNATIVE PERSPECTIVES

I have tried above to draw a picture of what, according to my survey of the literature, I believe to be the mainstream theory of the Rule of Law that has been constructed by Chinese legal scholars during the last few years. However, the survey of the Chinese jurisprudential scene would not be complete without some attention to the alternative visions and views of scholars who stand away from the mainstream. Some of them are skeptical about the whole discourse on the Rule of Law. Some point to its limitations and warn against placing too much hope on the Rule of Law. A few even argue that some of the ideas employed by the discourse run counter to Marxism and are therefore heretical. To these views we now turn.

¹²⁵ Du Gangjian, “The Reform of Constitutional Judicial Review in China and the Construction of a Socialist Rule-of-Law State,” in *Yifa zhiguo*, supra n. 1, 458.

¹²⁶ Chen Duanhong, supra n. 26.

¹²⁷ Id. at 6.

¹²⁸ The idea of the son taking the father to court was unacceptable in traditional Confucian culture. See generally Chen, supra n. 22.

First, some scholars caution against what they call the premise of the omnipotence of the Rule of Law¹²⁹ or “rule-of-law romanticism.”¹³⁰ The higher the hopes about the Rule of Law and its benefits, the greater the disappointment of members of the public when they find that problems remain unresolved after a lot of laws have been produced. Some point out that as a means of social improvement, law suffers from a number of inherent limitations and deficiencies. Law is in the form of general rules, and as has been recognized since Aristotle, situations inevitably arise in which the rigid application of the rules is inappropriate. The requirement for law’s stability means that the law tends to be conservative. Moreover, in a time of rapid social and economic change such as China is now experiencing, the law often lags behind the changing social reality and the requirements of reform, and may therefore become an obstacle to “reform and progress.”¹³¹

Secondly, it has been argued that not only ordinary laws may hinder economic reform and social progress, but the Constitution itself, if it had been strictly adhered to, would also have been an obstacle to reform. A scholar at the East China Institute of Law and Political Science has advanced an interesting thesis of “beneficial breaches of the Constitution.”¹³² He points out that grants of land-use rights were already practiced and private enterprises were already operating before the constitutional amendment permitting them was introduced in 1988. Similarly, calls for and moves towards establishing a market economy in 1992 were, strictly speaking, unconstitutional before the constitutional amendment in 1993. Even the assumption of law-making power by the NPC Standing Committee was probably unconstitutional before the 1982 Constitution was passed. He therefore argues that breaches of the Constitution should be allowed if they are “beneficial” in the sense of being conducive to the development of the productivity of society and advancing the fundamental interests of the nation.

Thirdly, the Rule-of-Law discourse, which represents in a sense a wholesale adoption of modern Western liberal thought, has also been criticized for being

¹²⁹ Gao Hongjun, *supra* n. 47 at 268; Li Youxing, *supra* n. 77.

¹³⁰ Chen Jinzhao, “Moving Out of the Error of the Omnipotence of the Rule of Law,” 10 *Faxue* (Jurisprudence) 7 (1995).

¹³¹ *Id.*; Hao and Fu, *supra* n. 36.

¹³² Hao Tiechuan, “On Beneficial Breaches of the Constitution,” 4 *Faxue yanjiu* (CASS Journal of Law) 89 (1996).

detached from Chinese social reality. It is pointed out that many recently enacted laws were drafted on the basis of foreign models without adequate investigation into and consideration of the relevant circumstances in China itself. As a result the laws are ineffective.¹³³ A legal anthropologist points out that various customary institutions of dispute settlement exist in rural China. They are outside the formal legal system but have a high degree of efficacy.¹³⁴ A legal historian suggests that some of the more successful legal institutions in the PRC's history, such as people's mediation and reform through labor, have their roots in Chinese tradition.¹³⁵

The leading theorist of the importance of "local resources" in the development of the Chinese legal system is a Peking University legal scholar.¹³⁶ He queries whether " 'modern' rule of law" is what is needed in Chinese rural society, and emphasizes the role of informal communal networks and customary patterns of behavior in contrast to formal legal rules and institutions. He does not believe that a legal system can be rationally and consciously designed and constructed by government or legal experts, or on the basis of some doctrines, concepts or theories. A legal system is the result of the actions, behavior, choices, attitudes, beliefs and values of millions of people in the course of their social interaction and legal dealings with one another. The most valuable resources for the development of the Chinese legal system lie in the informal practices, conventions, customs, norms and arrangements that spontaneously evolve in the course of social life and economic activities. He is therefore skeptical about the state-centered model of legal development that is implicit in the contemporary Chinese discourse on the Rule of Law.

Finally, it should be noted that some of the concepts introduced into the developing theory of the Rule of Law have been attacked from a "leftist" or orthodox Marxist-Leninist perspective.¹³⁷ For example, the glorification of the

¹³³ Gu Peidong, *supra* n. 72.

¹³⁴ Tian Chengyou, "The Question of Clans in Chinese Villages and the Destiny Of Modern La in the Villages," 2 *Falü kexue* (Law Science) 3 (1996).

¹³⁵ Ma Xiaohong, "The Rule of Rites and the Rule of Law," in *Yifa zhiguo*, *supra* n. 1, 367.

¹³⁶ Su Li, *supra* n. 38.

¹³⁷ See generally Sun Guohua, "Several Issues in Jurisprudential Research in Contemporary China," 4 *Faxue* (Jurisprudence) 2 (1996); Zhang Guangbo, "Legal Research and Insisting on the Socialist System," 1 *Dangdai sichao* (Contemporary Thought) 44 (1996), reprinted in 4 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 8 (1996); Lü Shilun, "Several Theoretical Questions relating to the Construction of the Legal System," 4 *Gaoxiao lilun zhanxian* (Colleges Theoretical Front) 42 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 4 (1996); Lü Shilun and Zheng Guosheng, "What Kind of Society is the Society under the Socialist Market Economy?" in *Yifa zhiguo*, *supra* n. 1, 440.

contract and of private law, and the affirmation of Maine's thesis on "from status to contract" in the context of contemporary China, have been criticized as misguided. Those holding these views point out that the freedom of contract belonged to the age of *laissez faire* capitalism and is already out-of-date even in the West. In the socialist economy, there should only be a limited scope for contractual relations. The predominance of public ownership of the means of production under socialism means also that the thesis of the priority of private law is unacceptable.¹³⁸ As regards Maine's thesis, the critics point out that this relates only to the transition from slave society or feudalism to capitalism, and it is not appropriate to apply it to China's present transition from the socialist planned economy to the socialist market economy.

The conservative scholars also attack the use of the concepts of social contract, civil society, the priority of rights and the spirit of modern law. They claim that the ideas of social contract and natural rights were ideological devices used by bourgeois writers to create the illusion of a just social order, to mask the reality of class oppression in the capitalist state and to deceive the proletariat. There is no need for these ideas in the socialist state. "The use of these terms would only serve to beautify capitalism and destroy socialism."¹³⁹ "Civil society" is said to be relevant only to bourgeois society in the period of *laissez faire* capitalism. The pillars of civil society are the sanctity of private property and the freedom of contract, so certainly the concept of civil society cannot be accepted under socialism. The use of the concept "the spirit of modern law" is criticized for obscuring the distinction between socialism and capitalism. The "leftist" sentiment of these scholars is vividly reflected in the following passage:

We must not exchange away Marxist principles when we borrow from, inherit or transplant Western legal and political thought and institutions.¹⁴⁰If we allow a "contract" of exchange between Marxism and non-Marxism, if we let Marxism be auctioned in the market, then this socialist society of ours can no longer be sustained.¹⁴¹

¹³⁸ In addition to the works cited in *supra* n. 137, see also Zhu Jingwen, *supra* n. 35; Wang Shen, "A Theoretical Exploration into the Characteristics of Chinese Legal Modernization," 11 *Faxue* (Jurisprudence) 2 (1996), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 16 (1997).

¹³⁹ Zhang Guangbo, *supra* n. 137 at 49.

¹⁴⁰ Lü Shilun, *supra* n. 137 at 44.

¹⁴¹ Lü Shilun and Zheng Guosheng, *supra* n. 137 at 447.

THE REALIZATION OF THE RULE OF LAW IN CHINA

Despite the countercurrents mentioned in the previous section, the paradigm of the Rule of Law constructed by the mainstream theorists appears to enjoy supremacy in contemporary China not only among scholars of law but also in the official propaganda about law and legality. But the vibrancy of the theory of the Rule of Law is partly a consequence of the grim reality of the lack of the Rule of Law in contemporary China. Scholars and top leaders call so strenuously for the Rule of Law precisely because flagrant violations of the Rule of Law have been so frequent and extensive, and China is so far away from achieving the Rule of Law. The developing theory of the Rule of Law postulates an ideal to be realized, an objective to be strived for, a goal to be reached. But if we look at the reality of contemporary China, the realization of this dream remains as distant as ever.

One can have a glimpse of this reality just by reading the works of the same scholars who write about the theory of the Rule of Law. There seems to be a consensus about facts such as the following:

- (a) The system of laws is far from satisfactory. Many laws on civil and commercial matters and on the implementation of the constitutional rights of citizens are still missing.¹⁴² Among the laws that are in force, many still reflect the thinking and practice of the socialist planned economy, and are inconsistent with the requirements of the developing market economy.¹⁴³ Law drafting techniques leave much to be desired; many legal provisions are vague or are merely policy statements, and mechanisms and responsibilities for enforcing them are often not provided.¹⁴⁴
- (b) Many laws, particularly those in the form of departmental and local regulations, are drafted by the central government department or local government concerned with furthering the interests of the department or the region with disregard for the general interest.¹⁴⁵ There is no effective system to check whether legal norms of a lower level (e.g., these regulations) contravene legal norms of a higher level (e.g., the Constitution, laws enacted by the NPC or its Standing Committee and administrative

¹⁴² Li Shuguang, "The Rule of Law in 1997: Five Problems and Five Trends," 2 *Faxue* (Jurisprudence) 2 (1997).

¹⁴³ Hao Tiechuan and Fu Dingsheng, *supra* n. 36; Cai Dingjian, *supra* n. 8.

¹⁴⁴ Li Shuguang, *supra* n. 142.

¹⁴⁵ Li Buyun, *supra* n. 31 at 60; Li Shuguang, *supra* n. 142; Hao Tiechuan, *supra* n. 118; Cai Dingjian, *supra* n. 8.

regulations made by the State Council). Neither is there any machinery to deal with the inconsistency that often arises between norms at the same level of the legal order.¹⁴⁶ Some local governments only enforce national laws selectively, or introduce protectionist measures contrary to national law and blocking the extension of a nationwide market.¹⁴⁷

- (c) The people's congress system is far from effective in the performance of its constitutional functions of legislation and supervision of government.¹⁴⁸ The quality of the members leaves much to be desired, and the congresses only meet infrequently. To a significant extent they are still rubber-stamp institutions. Furthermore, in practice, the status and authority of the people's congresses relative to other branches of government or the Party are actually much lower than prescribed in the Constitution, under which the people's congresses are the highest organs of state power.¹⁴⁹ They are not taken seriously enough by the people or officials.
- (d) The deficiency in the authority of the people's congress system in fact reflects the lack of supremacy of the Constitution. The unenforceability of the provisions of the Constitution has already been mentioned above.¹⁵⁰ An even more serious problem is that the constitutional and legal status of the CCP is still unclear. Although the Party exercises de facto governmental powers, its structure, powers and responsibilities are not regulated by law.¹⁵¹ The orthodox view, still stated in authoritative textbooks, that Party policy is "the soul of the law"¹⁵² creates the impression that the law may be set aside when it no longer reflects current Party policies. Most people are still confused about whether the law is above the Party, or whether the people's congress (the constitutional organ of state power) is above the Party organ.¹⁵³

¹⁴⁶ Li Shuguang, *supra* n. 142.

¹⁴⁷ Cai Dingjin, *supra* n. 8; Gu Peidong, *supra* n. 72.

¹⁴⁸ Fang Tenggao, "China's Strategic Choice of Sustainable Legal Development," 6 *Zhongwai faxue* (Peking University Law Journal) 11 (1995).

¹⁴⁹ Zhou Yezhong, *supra* n. 76.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Li Buyun, *supra* n. 31 at 65; Zhou Yongkun, *supra* n. 40; Fang Tenggao, *supra* n. 148.

¹⁵³ Fang, *id.*; Li Shuguang, *supra* n. 142; Zhou Yongkun, *supra* n. 40.

- (e) The de facto supremacy of the Party is one cause for concern as regards the administration of justice.¹⁵⁴ Although in theory the People's Courts should exercise their judicial power independently, in practice they are sometimes subject to pressure from Party organs. Even in theory the Party has legitimate authority to exercise leadership over judicial work by laying down general policies and guidelines, and such general principle of "leadership" can easily be turned into a pretext for interference in individual cases. But most scholars point out that currently the most serious failures in judicial independence are attributable not to "Party leadership" but to corruption among judges and law-related personnel and to the courts' subordination (in terms of financial dependence and appointment of personnel) to local governments. Thus the courts often adopt local protectionist measures in the exercise of their powers by favoring local parties whose interests often converge with those of the local government.¹⁵⁵ And bribery of judges and the use of personal connections to get favorable treatment by judges are so prevalent that they have become the subject of some Chinese popular expressions and jokes that have come into usage in recent years.¹⁵⁶ These problems are compounded by the fact that many judges have poor general educational backgrounds or lack professional legal competence.¹⁵⁷
- (f) Although the legal profession has enjoyed rapid growth in recent years and a sector of private law firms (under the names of cooperative firms and partnerships) has been allowed to develop alongside state law firms, the disregard of professional ethics and the deficiency in professional competence on the part of many lawyers have been a cause for concern.¹⁵⁸ The status of lawyers has not yet been firmly established, and some judicial and law enforcement personnel do not give due respect to lawyers and treat them poorly in their judicial and administrative work.¹⁵⁹

¹⁵⁴ See, e.g., Fang, id.; Zhou Yongkun, supra n. 40.

¹⁵⁵ Gu Peidong, supra n. 72; Fang Tenggao, supra n. 148; Cai Dingjian, supra n. 8.

¹⁵⁶ See the works cited in supra n. 155; Li Shuguang, supra n. 142; Hu Yunteng, supra n. 71; Li Youxing, supra n. 77.

¹⁵⁷ Li Lin, supra n. 27 at 258; He Qinhu, "It is Important to Raise the Professional Standards of Law Enforcement Personnel," 3 *Falü kexue* (Law Science) 14 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 20 (1996).

¹⁵⁸ Cai Dingjian, supra n. 8 at 401-402.

¹⁵⁹ Gu Peidong, supra n. 72.

- (g) A number of scholars have written about a crisis of the general public's faith in the legal system. The enthusiasm for law and legality that arose in the early years of the reform era seems to have been largely evaporated.¹⁶⁰ People see increasing numbers of laws being enacted, but find that the laws do not seem to be able to solve the mounting social problems. Many laws are not seriously enforced, conflict with one another, and serve only the selfish interests of departments or local governments; in addition, the system for law enforcement and administration of justice is corrupt and inefficient. Given such circumstances, how are people expected to have trust and confidence in laws and the legal system?¹⁶¹ So when people's interests are infringed upon, they blame the law for failing to protect them, and yet they disregard the law themselves when it is in their interest to do so.¹⁶²

In the face of so many obstacles to the Rule of Law in China, what positive ideas have been developed by scholars regarding how to proceed? They all recognize that the project of realizing the Rule of Law is extremely laborious and long-term, and a long uphill journey lies ahead. Movement towards the Rule of Law will have to be simultaneously promoted by the state and propelled by the civil society that is emerging from the market economy.¹⁶³ It is pointed out that the problems have to be tackled on two levels¹⁶⁴—conceptual or ideological renewal (in the sense of winning widespread acceptance of the doctrines, values and culture of the Rule of Law on the part of officials and citizens who in the past had no concept of the Rule of Law and no experience of practicing it) on the one hand, and institutional innovation on the other. The institutional proposals that have appeared more frequently in the literature include the following:

- (1) There should be a clear delineation of the scope of legislative power of the central and local (provincial, municipal, etc.) authorities, as well as that of different state organs at the same level (such as the people's congress, its

¹⁶⁰ Id.

¹⁶¹ Cai Dingjian, *supra* n. 8 at 402.

¹⁶² Sun Xiaoxia, *supra* n. 64.

¹⁶³ "Notes on the Conference on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State," 3 *Faxue yanjiu* (CASS Journal of Law) 3 at 16 (Shu Guoying's speech) (1996).

¹⁶⁴ Sun Guohua and Peng Hanying, "Jurisprudential Research in 1996: Retrospect and Prospect," 1 *Faxuejia* (Jurists' Review) 2 (1997); Zhou Yongkun, *supra* n. 28; Zhou Yongkun, *supra* n. 40.

standing committee, the government, the departments of government, etc.). A machinery should be established to deal with the problems generated by inconsistent legal norms enacted by different organs, and to review the validity of lower-level norms on the basis of higher-level norms.¹⁶⁵ It seems that some of these issues raised by scholars have now been addressed in the new Law on Legislation (*lifa fa*), enacted by the NPC in March 2000.¹⁶⁶

- (2) There is also active discussion about the desirability of introducing a system for the review of the validity of legal norms on the ground that they contravene the Constitution, and hence to interpret the Constitution itself.¹⁶⁷ An option favored by many scholars is to establish a constitutional committee under the NPC for this purpose. Another possible option, which is a more radical one, is to set up an independent constitutional court.
- (3) To avoid the current problems of government departments drafting laws that reflect their particular departmental interest to the detriment of more overall considerations, it has been proposed that the responsibility for drafting laws should be removed from interested government departments and vested in organs under the central and provincial legislatures (people's congresses) consisting of independent-minded legal experts and officials.¹⁶⁸
- (4) Suggestions regarding improvements in the legislative process have also been made.¹⁶⁹ For example, the public should be allowed to have input into the process, which means the existing practice of only consulting relevant bodies should be changed. Hearings should be held on bills, and their content should be more thoroughly debated in the legislatures. It has even been suggested that non-government bodies should be allowed to draft bills and introduce them in the legislatures.

¹⁶⁵ Cai Dingjian, *supra* n. 8; Li Shuguang, *supra* n. 142; Gu Peidong, *supra* n. 72.

¹⁶⁶ Fang Tenggao, *supra* n. 148; Li Buyun, 'Several Questions Regarding the Drafting of the PRC Law on Legislation (Experts' Proposed Draft),' 1 *Zhongguo faxue* (Chinese Legal Science) 11 (1997).

¹⁶⁷ Du Guangjian, *supra* n. 125; Zhou Yezhong, *supra* n. 76; Tong Zhiwei, "Legal Modernization Requires Eleven Elements of Constitutional Reform," 1 *Faxue* (Jurisprudence) 5 (1997); Zhou Yongkun, *supra* n. 40.

¹⁶⁸ Hao Tiechuan, *supra* n. 118; Gu Peidong, *supra* n. 72.

¹⁶⁹ Cai Dingjian, *supra* n. 8; Fang Tenggao, *supra* n. 148.

- (5) Institutional reforms of the people's congress system have been proposed.¹⁷⁰ These include extending direct election to people's congresses above the county level (at present these higher level people's congresses are elected by members of the lower-level people's congresses, and only people's congresses at the county level or below are directly elected), reducing the number of deputies to the congresses so that they can work more effectively, lengthening the sessions of the congresses so that they have more time for their work, and institutionalizing and increasing their powers to supervise the work of government organs and officials. The latter point will apparently be addressed by the Law on Supervision, which is in the pipeline.¹⁷¹
- (6) Effective supervision of the exercise of governmental powers is seen by many scholars as the key to the Rule of Law.¹⁷² In addition to supervision by the people's congresses as representatives of the people as discussed earlier, some scholars also emphasize the important supervisory role of public opinion and the mass media. The people's right to information about governmental affairs and freedom of speech are advocated. For instance, it is argued that "in the domain of the struggle against corruption, there should be no 'forbidden zone' for news media."¹⁷³
- (7) As mentioned above, apart from corruption, the most serious problem that plagues the system of the administration of justice results largely from the local courts' subordination to the local government in terms of financial and personnel matters. Hence many scholars advocate a reform of the court system that would de-link the courts from the local governments. Suggestions include the use of the national budget to finance the local courts, the "vertical" administrative leadership of courts (by higher courts) and removal of their "horizontal" linkage to the local government structure, as well as the establishment of a dual court system (national courts and regional courts) in which the national courts (like federal courts in some federal states) have jurisdiction over cases that involve interests in more than one province or region. Other proposals relating to the judiciary

¹⁷⁰ Zhou Yongkun, *supra* n. 40; Tong Zhiwei, *supra* n. 167.¹⁷⁰ Zhou Yongkun, *supra* n. 40; Tong Zhiwei, *supra* n. 167.

¹⁷¹ Hao Tiechuan, *supra* n. 118.

¹⁷² Ye Feng and Xie Pengcheng, *supra* n. 56; Fang Tenggao, *supra* n. 148.

¹⁷³ Ye and Xie, *id.* at 12.

include security of tenure for judges and better conditions of employment.¹⁷⁴

- (8) A few writers touch on the question of the reform of the system of Party leadership, which is in fact a crucial element of any future reform of the Chinese political system. As mentioned earlier, the central legal issue in this regard is the extent to which the organization, structure, functions, powers, responsibilities and operations of the Party should come under the purview of the law, given that it is financed by the state budget, its personnel are paid by the state, and it has the constitutional mandate to exercise “leadership” (the manner and procedure of which are not yet legally defined).¹⁷⁵

The above relates to the more concrete proposals in the literature. It may also be noted that some scholars have addressed the more long-term scenarios in the development of the Rule of Law in China. The following are some examples.

One view is that the past, present and future of the legal history of the PRC may be divided into four stages: (1) “quasi-constitutionalism” (culminating in the first PRC Constitution of 1954); (2) “big democracy” (as conceived by Mao and exemplified by mass movements culminating in the Cultural Revolution); (3) “regularized politics” (as developed in the post-1978 reform era); and (4) “modern Rule of Law” (which belongs to the future). It is said that China is now in transition from stage 3 to stage 4.¹⁷⁶

A second scholar uses the knife, the baton and the bridle to symbolize the three stages of legal evolution in the PRC. The period of “the knife” ran from 1949 to the early 1980s. Law was conceived as an instrument of class dictatorship and for the suppression of “enemies.” Hence law meant primarily criminal law. The period of “the baton” began in the 1980s and continues to the present. Law is conceived as a tool for administrative management of people and the economy. This is an era of administrative law and economic law. The next period in China’s legal evolution will be that of “the bridle.” This will be the

¹⁷⁴ See generally Hao Tiechuan, *supra* n. 118; Zhou Yongkun, *supra* n. 40; Cai Dingjian, *supra* n. 8; Gu Peidong, *supra* n. 72.

¹⁷⁵ See generally Hao, *id.*; Zhou, *id.*; Tong Zhiwei, *supra* n. 167; Jiang Lishan, *supra* n. 119; Zhuo Zeyuan, *supra* n. 119.

¹⁷⁶ Xie Pengcheng, *supra* n. 41. See also Ye and Xie, *supra* n. 56.

age of constitutionalism. Law will control the exercise of state power, prevent its abuse and protect the rights of citizens. It will attend not only to order and efficiency (the concerns of the previous eras), but also to justice, equality, freedom and democracy.¹⁷⁷

A third writer suggests that the evolution of the Rule of Law in China may be viewed from three perspectives, each embracing three stages. In the first perspective, the transition is from (1) “doing things according to law” to (2) “ruling the country according to law” to (3) “ideal rule of law.” China is now moving from 1 to 2. In the second perspective, the movement is from (1) “rule by the Party” to (2) “rule by the State” to (3) “rule by the law.” China is now moving from 1 to 2. According to the third perspective, the development of the Rule of Law in China consists of three stages: (1) “the preparatory stage” (from 1978 to 1993, the year in which the constitutional amendment on the socialist market economy was introduced); (2) “the take-off stage” (from 1993 to 2010); and (3) “the formation and perfection stage” (post-2010).¹⁷⁸

A fourth writer also adopts a long-term perspective, in this case up to the mid-twenty-first century. He distinguishes between the periphery and the core of the legal system, and uses a cost (risk)-benefit analysis to predict the development of these two parts of the legal system. In his theoretical framework, the periphery of the legal system relates to effective law enforcement and general obedience to law (“rule by law”), whereas the core of the legal system consists of constitutionalism and effective restraint of state power (“rule of law”). The construction of this core would mean a fundamental reform of the existing political system. He believes that China’s construction of its legal system will have to begin with the periphery. The reform of the political system is a high-risk venture with uncertain benefits, which will have to be postponed until probably the middle of the twenty-first century, when the social and economic conditions (including the people’s educational standards and the size of the middle and entrepreneurial classes) will be ripe for the reform.¹⁷⁹

¹⁷⁷ Cai Dingjian, *supra* n. 8. See also Cai Dingjian, *supra* n. 82.

¹⁷⁸ Zhuo Zeyuan, *supra* n. 119.

¹⁷⁹ Jiang Lishan, *supra* n. 119.

CONCLUDING REFLECTIONS

As we review the substance of the theory of the Rule of Law, which Chinese scholars have been constructing in recent years, we may find most of the points they made commonplace. Is not what they are stating so obvious that it may not even be worth putting into writing? But a Western audience will have this feeling only because they live in a post-Enlightenment world which has taken for granted the liberty, equality, human rights, Rule of Law and constitutionalism that the Enlightenment thinkers advocated more than two centuries ago and that generations of revolutionaries and activists in the Western world have fought hard to win in the nineteenth and even the twentieth centuries.

Only if we take into account the burdens of history that lie on the shoulders of contemporary Chinese intellectuals shall we be able to appreciate the full significance of the developing theory of the Rule of Law as outlined in this article. These historical burdens include not only more than two millennia of imperial rule, which so often degenerated into despotism and tyranny, but also the Marxist-Leninist degradation of the Rule of Law and its associated values, as well as the explicit rejection and total repudiation of Rule-of-Law practices and values in China during the Cultural Revolution era, which left China in a state of total ruins in the late 1970s. After that time, some primitive structures of law and legality have been erected.¹⁸⁰

Even after the reform era began in 1978, the reconstruction of legal theory has not been a smooth and straightforward process. A number of setbacks were encountered during which more liberal-minded scholars were accused of promoting “bourgeois liberalization.” These included a campaign against “spiritual pollution” in 1983, a campaign in 1987 against “bourgeois liberalization” following the students’ democracy movement in 1986 and culminating in the downfall of the Party General Secretary Hu Yaobang, and an even more intensive and extensive campaign along similar lines in the aftermath of the events leading to June 4, 1989. The movement since 1996 for the Rule of Law among Chinese jurists has only been politically possible because of the building momentum for reform since Deng’s southern trips in 1992, the constitutional affirmation of the concept of the socialist market economy in 1993, and President Jiang Zemin’s personal call for “ruling the country according to law” in early 1996.

¹⁸⁰ See generally Chen, *supra* n. 3.

The phenomenon of the developing theory of the Rule of Law in contemporary China may therefore be understood as a maneuver on the part of legal scholars in a complex political environment at an opportune moment, seizing hold of a golden opportunity to give a push to the development of the Chinese legal system in what they believe to be the right direction. As in the case of the French philosophers of the eighteenth century Enlightenment, the ideas advocated by the Chinese scholars may not be intellectually sophisticated, theoretically refined or rich in philosophical depth, and they are certainly not original, but their significance and impact (like the ideas of the Enlightenment) lie in the fact that they do address real problems in contemporary social and political life. The problems China faces revolve around the lack of effective legal, political and popular control over the exercise of the huge powers of the ruling apparatus of the State, Party and bureaucracy, and it is believed that the Rule of Law can provide a powerful solution to many of these problems.

It may be pointed out that the theory does not go far enough. It falls short of querying the principle of the “leadership” of the CCP. It does not address sufficiently the question of human rights, particularly the civic freedoms of speech, publication, assembly and association, not to mention the political rights associated with Western-style free elections. It also eschews inquiry into the question of private property rights as a possible pillar of civil society, social contract, private law and the system of rights, even as it tries to rehabilitate and even glorify these latter ideas. We can therefore observe clearly that there are still untouchable subjects and forbidden zones in academic discussions in contemporary China. The Marxist ideologues’ critique (discussed earlier) of some of the concepts advocated by the theorists of the Rule of Law demonstrates how much the dogmas of the Marxist orthodoxy as codified by the Soviet and Maoist states are still alive and well in China in terms of legitimacy, and can be easily resurrected to become the “mainstream” opinion should the political climate turn against liberalization at some future point. But for the moment, scholars who believe in the Rule of Law are already doing their best.

With regard to the insights of neo-Marxism, critical legal studies and various strands of postmodernism in the West, it might be suggested that the Chinese theorists of the Rule of Law are naive in their unqualified embrace at face value of the discourse of reason, subjectivity, liberty, equality, rights, progress and modernization. However, I believe this criticism would miss the point. What must be remembered is that the West has already developed elaborate legal systems that more than fulfill the highest hopes and noblest dreams of the

thinkers of the Age of Enlightenment. The postmodernist takes these achievements for granted, and goes on further to expose the hypocrisy, arrogance and darker sides of modernity. The problem now confronted by the Chinese people is the non-existence of an advanced legal system that protects basic rights and guarantees equality of all before the law. They need to construct a legal system that meets their needs and aspirations, not to deconstruct a legal system that is reaching the limits of development. It is therefore right, I believe, for the Chinese theorists of the Rule of Law to put aside postmodern concerns.¹⁸¹

But it can also be pointed out, particularly by those who appreciate the past achievements of the long-lasting Chinese civilization, that contemporary Chinese scholars are probably too quick and ready to turn to the intellectual resources of the West in developing their theory of the Rule of Law, and to discard the values and resources of the Chinese tradition. It is important to bear in mind in this regard that “Chinese tradition” is by no means a monolithic whole. There have always been conflicting lines of thought and modes of practice in Chinese history, and the fact that Confucian paternalistic rule triumphed most of the time during the last two millennia does not mean that it is the eternal essence of Chinese culture.

For example, it has often been pointed out that in the late Ming and early Qing dynasties, there was an anti-authoritarian strand of thought, as exemplified by the great philosopher Huang Zhongxi who advocated a doctrine of the “rule of law” with the law being in the interest of all under Heaven, instead of the “rule by law” that had been practiced hitherto with law representing only the interests of the emperor, his ancestors and successors.¹⁸² The leading neo-Confucian philosophers of this century also advocated the introduction in China of Western-style constitutional democracy, and even argued that this would be the ultimate fulfillment in the political sphere of the humanist Confucian project.¹⁸³ The successful introduction of Buddhism into China after the Han dynasty is often cited as a paradigmatic example of Chinese civilization borrowing

¹⁸¹ See the debate regarding whether postmodern thought is relevant to contemporary Chinese legal developments in Ji Weidong, “Towards 21st Century Law and Society,” 3 *Zhongguo shehui kexue* (Social Sciences in China) 104 (1996); Zhu Suli, “Postmodern Thought and the Jurisprudence and Legal System of China” 3 *Faxue* (Jurisprudence) 11 (1997).

¹⁸² See W.T. de Bary, “Chinese Despotism and the Confucian Ideal: A Seventeenth-Century View,” in *Chinese Thought and Institutions* 163 (John K. Fairbank, ed. 1957).

¹⁸³ Chen, *supra* n. 22.

important resources from the outside.¹⁸⁴ We may therefore interpret the current efforts of Rule-of-Law theorists in China as an attempt to foster a new Chinese political culture that is liberal, constitutional and democratic, in contrast to the imperial and Maoist political cultures, which were both dogmatic, authoritarian and paternalistic.

And this, after all, was also what the Enlightenment was about in Western Europe more than two centuries ago. I use the term “legal enlightenment” in the title of this article, because I find a kind of parallel between the intellectual currents in contemporary China and their relationship with contemporary society on the one hand, and the intellectual movement in Enlightenment Europe and its relationship to social conditions on the other hand. For China, the May Fourth Movement eight decades ago was also an enlightenment, but the social and economic conditions were then not ready for liberal constitutionalism, and the movement ended with the triumph of Marxism-Leninism as a new dogmatism. Will this second “enlightenment” fare better? In the last two decades, economic reform—China’s second revolution—has transformed many shabby Chinese towns into modern-looking metropolises. “Material civilization” of the kind seen in the West is clearly in the making. Will the “spiritual” or “institutional civilization” that the Rule of Law embodies also arrive?¹⁸⁵ If the modernity that was first experienced in the West can and will be globalized, which I believe can and will, then this question can be happily answered in the affirmative.

¹⁸⁴ See, e.g., W.T. de Bary, *East Asian Civilizations: A Dialogue in Five Stages* (1988).¹⁸⁵ On the concepts of spiritual and institutional civilizations and their relationship with the Rule of Law, see Yifa zhiguo yu jingshen wenming jianshe (*Ruling the Country According to Law and the Construction of Spiritual Civilization*, Liu Hainian et al. Eds., 1997); “Notes on the Conference on *Ruling the Country According to Law and the Construction of Spiritual Civilization*,” 3 Faxue yanjiu (CASS Journal of Law) 3 (1997).

¹⁸⁵ On the concepts of spiritual and institutional civilizations and their relationship with the Rule of Law, see Yifa zhiguo yu jingshen wenming jianshe (*Ruling the Country According to Law and the Construction of Spiritual Civilization*, Liu Hainian et al. eds., 1997); “Notes on the Conference on *Ruling the Country According to Law and the Construction of Spiritual Civilization*,” 3 Faxue yanjiu (CASS Journal of Law) 3 (1997).

The Dilemma of Stability Preservation in China

FENG Chongyi

Stability preservation (维稳, *weiwén*) has been a core policy of the Chinese communist government for the last two decades. China is the only major country in the contemporary world to have set up stability preservation offices at all levels of government alongside the normal administrative institutions for social control. These offices are mainly staffed by the existing personnel of the security apparatus, who in turn exercise control over people and the propaganda apparatus, who exercise control over information. The consequences of the stability preservation policy and the “system of stability preservation” (维稳体制, *weiwén tǐzhì*) are widely reported in the media, but the academic community is still in the initial stages of understanding the process of this unique phenomenon in China (Sandby-Thomas 2011; Shambaugh 2000; Social Development Research Group 2010; Sun 2009; Yu 2009). Why has the Chinese government pursued this policy? Is stability preservation in China a conventional issue of “law and order”? Are the policy and institutions of stability preservation effective in providing social and political stability? What are the implications of these special arrangements for China and the Chinese communist regime in the long run?

Causes of Social Unrest

Social unrest has become a normal feature of China today, with about 500 “mass incidents” (群体事件, *qunti shìjiàn*) a day on average (Sun 2009). These collective protests are part of the “rights defence movement” (维权运动, *weiquan yundòng*), a broadly based social movement involving all social strata throughout the country to assert human rights through individual and collective litigation, petitions, campaigns and protests (Feng 2009: 150–168; Benny 2012). Most cases of rights defence aim to defend economic and social rights and include, but are not limited to, protests by peasants against forced seizures of farmland; strikes by workers against low pay and poor working conditions; protests by home owners against forced eviction by government and developers; protests by residents against forced relocations; campaigns by citizens against

unpaid social entitlements; and protests by affected residents against environmental pollution. However, apart from ethnic conflicts and riots in Tibet and Xinjiang, the active defence of civil and political rights is also on the rise and includes campaigns by lawyers, journalists and writers for the freedoms of speech and the press; campaigns by Christians from the house churches and Falungong practitioners for the freedom of religion, beliefs, assembly and association; campaigns against arbitrary detention, “re-education through labour”, torture and excessive implementation of the death penalty; and campaigns against injustice and abuses of public power by victims of party-state agents. Notably, thousands of petitioners have flocked to Beijing or provincial capitals to seek redress for perceived injustices. The rights defence movement is greatly enhanced by the emergence of an incipient civil society, with about four million NGOs and “semi-NGOs” – according to the widely accepted estimate that officially registered NGOs account for only 10 per cent of the total – and the rapid development of the Internet in China, which had 564 million netizens as of the end 2012 (China Internet Network Information Center 2013).

Growing social unrest in China reflects deep institutional problems that create structural injustice and block legal remedies for victims. First, the incipient civil society is kept under tight control, and disadvantaged groups (弱势群体, *ruoshi qunti*) such as peasants and rural migrant workers are not allowed to have their own organisations to safeguard their rights and interests, including representation in negotiations and engagements with other parties in collective bargaining. The official trade union in China is an arm of the Chinese government and there are no independent trade unions to safeguard the rights and interests of workers, especially in labour disputes over low wages and poor working conditions. Peasant associations were used as a political tool by the party during the Mao years, but they have been banned in the reform era, leaving the peasantry without even pretend representation by the state-controlled “mass organisations” allocated to other social groups such as workers, women and youth.

Second, endemic corruption and abuse are bred by and rooted in China’s power structure, where bottom-up mechanisms to make power-holders accountable to citizens are absent. As demonstrated by convincing surveys and analysis, what angers Chinese citizens enough for them to confront the system by taking to the streets are, in most instances, not the income gap or inequality *per se*, but procedural injustices and unequal

access to opportunities due to abuses of power by the powerful and rich, who monopolise resources and benefits (Whyte 2010).

Third, the monopoly of all formal political and legal institutions by the party-state apparatus deprives citizens of effective redress of their rights and grievances through legal or formal political processes. One survey found that the cases of seeking formal legal channels to resolve grievances accounted for less than 2 per cent of the total of all cases surveyed (Congressional-Executive Commission on China 2004: 72). It has also been reported that only 0.2 per cent of the total petitions to the Offices of Letters and Visits (信访办公室, *xinfang bangongsi*) are addressed by authorities (Zhao 2004).

Last but not least, the “system of stability preservation” creates special conditions and incentives for local officials to abuse citizens and force them to take defensive actions, legally or otherwise. Local governments at the township and county levels are required to collect extra-budgetary revenue (预算外收入, *yusuanwai shouru*) or self-raised funds (自筹资金, *zichou zijin*) to cover part of the stability expenditure, such as salaries for casual personnel and financial settlements for disputes. The most common sources of extra-budgetary revenue are generated by undermining the rights and interests of citizens, including doling out fines for violating family-planning laws, collecting rents and income from leasing and selling collective land, and extracting fees and “donations” from local enterprises. As a consequence, family planning and land seizure by local governments have become common causes of social unrest in the countryside.

The “responsibility system” (责任追究制, *zeren zhuizhi zhi*) to evaluate the work performance of local cadres also exacerbates social unrest. Social order is set as one of the “one-vote veto” (一票否决, *yi piao foujue*) targets, which can be used to nullify a cadre’s achievements in meeting other performance targets. Failure to prevent either “mass incidents” or “petitioning to higher levels” (越级上访, *yueji shangfang*) can cancel out positive performance in other areas and result in the loss of promotions, among other punishments (The Central Public Security Comprehensive Management Commission 1991; Minzner 2006).

Repressive measures taken by local officials to meet this veto category of targets, such as suppressing manifestations of grievances, further infringe upon the rights of citizens and actually force them to resort to collective protests and petitions with the hope that the intervention of higher-level authorities may resolve their grievances.

Preserving Stability at the Expense of the Rule of Law?

If stability preservation in China today is a “law-and-order” issue in a “normal” society, one would expect the government to consider the pursuit of the rule of law as a key policy. Social order can be achieved and maintained only when no individuals or political organisations are above the law, the rights and legitimate interests of citizens are well protected by the law, legal remedies are available to address injustices and grievances, and social conflicts can be resolved through formal political and legal channels. The Chinese government has, in fact, put the establishment of the rule of law on the reform agenda. Since the 1980s, the regime has made efforts to carry out legal reforms and come to terms with human rights norms as delineated by international treaties. By the 2000s, for the first time in Chinese thinking, a clear distinction began to be made between the rule of law (法治, *fazhi*, rulers subject to and limited by the law for protection of human rights and justice) and rule by law (法制, *fazhi*, law as a tool for the rulers to control the population). In the meantime, the CCP leadership has created and allowed space for the growth of the legal profession, with more than 200,000 lawyers employed at 19,000 law firms in China today. Four amendments to the Constitution, in 1988, 1993, 1999 and 2004, have endorsed important goals and principles such as “to rule the country according to law and build a socialist country under the rule of law”, “to protect private ownership” and “to respect and safeguard human rights”. The 1989 Administrative Litigation Law authorised the judicial review of government decisions and lawsuits against government agencies. The government signed the *International Covenant on Economic, Social and Cultural Rights* in 1997 (ratified in 2001) and the *International Covenant on Civil and Political Rights* in 1998 (pending ratification). More broadly, legal reform and development in China have been characterised by massive transplantation of Western laws into the Chinese legal system (Zou 2006). By the end of 2012, the impressive body of legislature included 243 laws, 721 national administrative regulations and more than 9,000 local administrative regulations (*People’s Daily* Commentary Department 2013a).

However, the rule-of-law rhetoric notwithstanding, the rigorous formulation of laws is accompanied by their pervasive violation and highly selective enforcement, due largely to the government’s priority of stability preservation. The government is the primary violator of its own

laws. From the perspective of principal–agent relations, there is a tacit approval from the central government of the state bureaucracy ignoring laws and regulations in achieving the policy priorities of stability and economic growth, which are believed to be preconditions of each other. The Chinese central government has juxtaposed economic development and social stability as the twin priority tasks since 1989, although it was in 2005 when Deng Xiaoping’s two separate statements “stability overrides everything” (稳定压倒一切, *wending yadao yiqie*) and “development is the unyielding principle” (发展是硬道理, *fazhan shi ying daoli*) were combined into the formula “development as an unyielding principle and stability as non-negotiable responsibility” (发展是硬道理, 稳定是硬任务, *fazhan shi yingdaoli, wending shi ying renwu*). These policy priorities actually create systematic imperatives for the state bureaucracy, local governments and security apparatuses, in particular, to fulfil their responsibilities at any costs, resulting in rampant corruption, manipulation of information, seizures of village land and urban housing for development projects, damage to the environment, abuse of the law, violation of the law, harassment of rights activists, suppression of local discontent, and the use of violence within certain limits. Article 35 of the Chinese Constitution stipulates that “citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration”. Whereas this clause on rights and freedoms in the Constitution is routinely ignored or violated, those unconstitutional, “evil laws” (恶法, *efǎ*), such as the harsh punishment for subversion, for “inciting subversion of state power” and for committing other political crimes under the Criminal Law, as well as the arbitrary punishment of loosely defined crimes of evidence falsification by lawyers in the Lawyers Law, are enforced with exceeding enthusiasm.

Worse still, stability preservation in China today relies predominantly on extralegal measures and methods, which has the effect of undermining social stability and existing legal institutions. Under the guise of preserving stability, the state bureaucracy has been given a free hand, more coercive power and more resources to crush dissent. One common practice on the part of the government is to bypass the law and use the notorious scheme called “re-education through labour”, a system of administrative detentions carried out arbitrarily by the police circumventing the judicial system, with sentences of up to four years. Detainees are subject to forced political education and various forms of torture. Rights defence lawyers, who promote legal processes as a means of improving

Chinese human rights conditions and who commit to reducing social unrests by channelling citizen discontent into legislative and judiciary institutions, have become a primary target for suppression. They have experienced frequent harassment by the party-state: They have been blacklisted, suspended, monitored, confined, detained and even jailed (Human Rights Watch 2008). In the recent government preemptive strike on Middle Eastern-style protests in connection with an online call to gather in public places – the so-called “Jasmine Spring” of 2011 – rights lawyers have again become major targets of intimidation and abuse (Wong 2011). Besides criminal and extralegal punishments, administrative sanctions on lawyers, such as suspending and revoking their licences during annual reviews, are routinely exacted by local Justice Bureaus and their proxies, the lawyers’ associations. Media reports in China showed that at least 150 political “criminals” have been imprisoned under the Hu–Wen leadership over the past ten years (Bei 2012). Currently, China’s record is as bad as Iran’s in terms of jailing dissident journalists. Reporters without Borders ranked China 174th out of 179 countries in its 2011/2012 worldwide index of press freedom (Reporters without Borders 2012). The crackdown on human rights activists and other dissidents has been so intensive and extensive in recent years that legal scholars at home and abroad have pointed to a retrogression of Chinese official legal reform toward the rule of law (Cohen 2009; Jiang 2009).

At a more fundamental level, the rule of law is incompatible with a Leninist party-state, simply because the core of Leninism is “proletarian dictatorship”, which, according to the classic definition by Lenin himself, means “nothing other than power totally unlimited by any laws and based directly on the use of violence” (Lenin 1972: 623). There is little wonder that law enforcement institutions in China, including the police, the prosecutor’s office, and the courts are still lumped together as the “political and legal branch” (政法部门, *zhengfa bumen*) and the “dictatorship organs” (专政机关, *zhuanzheng jiguan*) of the party-state – their primary function is to suppress dissidents rather than control criminals in the conventional sense.

There are growing voices not only among Chinese liberal intellectuals but also within the party-state that stability should not and cannot be sought at the expense of the rule of law. With reflections on the outrageous case where Anyuanding (安元鼎), a private security company in Beijing, was paid enormous sums of money by local governments all over China to kidnap, lock up and repatriate petitioners, the influential

commentator Xiao Shu pointed out that the local governments believed it was politically correct to ignore the law and do all kinds of evil as long as all actions were carried out in the name of “preserving stability”. Xiao states that it was of paramount importance to use the Constitution and the law in bringing “stability preservation” under control within the legal framework (Xiao 2010). The *People’s Daily*, the mouthpiece of the Chinese Communist Party (CCP), has published a series of articles recently to promote the rule of law in maintaining social stability. It has been argued that the objective of stability preservation, just as that of law, is to serve the fundamental interests of the people (Huang 2012); that it is essential to abide by the idea and methods of the rule of law in resolving social contradictions and preserving stability (*People’s Daily Commentator* 2013a); that the government abiding by the law is the precondition for the people to abide by the law (*People’s Daily Commentary Department* 2013b); and that the substance, procedure and effect of the law in dealing with every case must reflect judicial justice (*People’s Daily Commentator* 2013b). In an article published in *The Study Times* (学习时报, *Xuexi Shibao*), the weekly newspaper run by the Central School of the CCP, two brave commentators lament that pervasive violation of laws to preserve stability has done serious damage to the credibility of the law in China. According to them, many measures taken while under pressure to preserve stability – administrative detentions and education through labour, in particular – are against the spirit of the rule of law and must be rectified (Cai and Chen 2013).

Further Erosion of Regime Legitimacy under the System of Stability Preservation

According to plausible synthesis, state legitimacy is rightful rule, where rightfulness entails meeting the moral standards of a given citizenry. A state or a government (the distinction between the two is usually obscured by undemocratic regimes) is legitimated by exercising political power with legality, moral justification and popular consent (Gilley 2009: 5–8). A lack of, or serious deficit in, legitimacy produces tremendous fear of revolt and anxiety, if not full-blown paranoia, among ruling elites about regime survival. The CCP leadership seems to believe the party has the resources to eliminate any threat to its monopoly on power. But they know the foundation of regime stability is fragile (Shirk 2007: 56). It is the constant legitimacy crisis resulting from the bankruptcy of com-

munist ideology, structural corruption, social alienation and rejection of aspirations for democracy and human rights by the ruling elite since 1989 that has prompted the Chinese communist regime to formulate and implement the policy of preserving stability. However, it is precisely this policy of preserving stability and the system of stability preservation that exacerbate the legitimacy crisis evidenced by a whole range of symptoms such as the deepening of crises of belief, confidence and trust (信仰危机、信心危机、信任危机, *xinyang weiji*, *xinxin weiji*, *xinren weiji*); the worsening of elite corruption and moral degeneration; the growth of civil disobedience and unrest; the spread of crime; and the emerging secession movements among Tibetans, Uyghurs and Mongolians.

Not surprisingly, the diagnosis of “regime legitimacy crisis” in China is hotly contested by some China scholars. Their arguments in dismissing the legitimacy crisis of the Chinese communist regime can be summarised in the following way: First, evidence from high-profile surveys, including from the Pew Global Attitudes Project and the Asian Barometer Survey, has demonstrated that the majority of the Chinese population is satisfied with their government and political system; in fact, satisfaction rates are higher in China than among people living in democracies *vis-à-vis* their respective governments/ political systems. Second, some scholars argue that the Chinese government truly deserves this high approval rate from the population, due to not only “performance legitimacy” in managing rapid economic growth, improving living standards and providing welfare and services, but also to nationalistic legitimacy in making China a “glorious great power”, as well as to political legitimacy in providing good governance in the areas of maintaining stable social order, promoting greater accountability and broadening political participation. Third, according to these scholars, social protests do not pose a serious challenge to the legitimacy of the Chinese communist regime: Popular protests tend to challenge local governments, but not the central government, and to demand policy change but not regime change; in addition, ethnic riots and the threat of separatism are not major concerns as the state has won over the majority of the economic and political elites of the minority groups (Gries and Rosen 2010, 2004).

These arguments provide a sensible explanation for the extraordinary duration and resilience of communist autocracy in China, but from both the methodological and theoretical perspectives, they seem to confuse regime legitimacy with regime survival (illegitimate regimes can survive very long periods of time for a variety of reasons). At the methodo-

logical level, attitudes surveys in authoritarian countries are not always reliable and are sometimes problematic to the point of being misleading, given that almost all of the surveys in the former Soviet Union and other autocracies before their collapse showed overwhelming popular support for the government. People in communist societies live in profound fear. Mindful of the deadly consequences of dissent, they do not usually reveal to strangers their negative assessment of the party, nor do they have reasonable access to information to cultivate informed and stable opinions, thanks to strict censorship and thought control. Their attitudes can shift overnight when they are presented with choices and opportunities for change, as evidenced by the experience of swift regime change in the former communist world from 1989 to 1991. The remaining five communist regimes (China, Vietnam, North Korea, Laos and Cuba) have survived with vastly different strategies, a fact that presents a puzzle for anyone attempting to trace their survival back to their legitimacy.

Claims based on problematic survey evidence fail to recognise the growing influence of the liberal force in China. It is true that the party-state has been successful in using the proved divide-and-conquer strategy, in which protest leaders are punished as criminal elements while measured concessions are made to ordinary participants to prevent isolated popular protests from developing into sustained movements of national scale. However, it is beyond the party's abilities to stop the rise of political alternatives represented by the Chinese liberal camp consisting of liberal intellectuals, democrats within the party, rights lawyers, grass-roots rights activists, democracy movement leaders and liberal Christians. With the Internet as an alternative national organisation for coordination, they have taken many coordinated collective actions, including publishing and disseminating *Charter 08* and other online petitions to call for an end to the communist monopoly on power and provide the rights defence movement with a blueprint for constitutional democracy (Feng 2012: 119–139, 2010). Every effort has been made by the security apparatus to eliminate any groups which appear to challenge the legitimacy claim of the CCP, but the party-state has failed to defeat the challenge posed by the Falungong and Christian house churches. Both have become sustained movements of popular opposition or civil disobedience with claimed membership levels of over 70 million each.

At the theoretical level, the legitimacy claim of the Chinese communist regime reveals the complexity in identifying sources and criteria of legitimacy. Weber's classic threefold legitimacy sources of charisma,

rationality (legality) and tradition have now expanded to include many new sources such as social order, justice, procedural fairness, national security, general welfare, accountability, efficiency and economic growth (Gilley 2009: 30). Furthermore, different schools of thought lay different emphases on these diverse sources of legitimacy, such as social and cultural conditions (sociological approach), economic growth and distributive fairness (developmental approach), state capacity (bureaucracy school) and democracy and human rights (liberal school).

The underlying reason that the system of stability preservation has contributed to further eroding the legitimacy of the Chinese communist rule established through violent revolution is the rise of rights and democracy consciousness among the population and the hegemony of democratic legitimacy in the contemporary world. Democracy, human rights and the rule of law have now become genuine universal values accepted by the Chinese thinking public, who believe that government legitimacy is based on the free, fair and regular election of legislative and executive power-holders. Commitment to political reform in expanding democratic participation, marching toward the rule of law, enhancing public supervision over the state bureaucracy and effectively protecting human rights are essential for the legitimacy claim of the CCP in the reform era. By blocking meaningful political reform toward democracy, dismissing the rule of law as a viable institutional mechanism to ensure social stability and rejecting democratic processes and procedural justice, China's system of stability preservation undermines the key sources of its regime legitimacy.

In conclusion, the policy and institutions of preserving stability in contemporary China are counterproductive. They have infringed on the rights and legitimate interests of the people and themselves become the causes of social and political instability, plunging China into a vicious circle, where "more efforts to preserve stability are responded to by worsening instability" (越维稳越不稳, *yue weiwen yue buwen*). These institutions and policies have undermined legal institutions and judicial justice, derailed legal reform, compromised the universal values of human rights and democracy and undercut the vital sources of regime legitimacy. One challenge facing the new Chinese leadership is that China cannot move forward in social and political developments, in particular to renew regime legitimacy through democratic election, without abandoning the current policy and system of stability preservation.

The five articles in this topical issue are selected from papers first presented at the Preserving Stability Conference initiated by David Kelly and organised by the China Research Centre at the University of Technology, Sydney, in July 2011. More than 20 conference participants contributed generously to the discussion and revision of these articles.

Feng Chongyi's article provides an overview of the political order of stability preservation in contemporary China. It traces the origins of the discourse, policy and practice of preserving stability, particularly the evolution of the system of stability preservation and its interplay with the rights defence movement. The article examines the end and the means of stability preservation, pointing out that the stability discourse and the additional administrative institutions of stability preservation are extraordinary measures taken by the Chinese communist regime to arrest the trend of democratic change and perpetuate communist rule after the global collapse of communism. The Chinese population and the Chinese government differ greatly in their focus and approach with regard to social stability. Whereas the major concern of the government is regime survival, the population is yearning for a new order where society is free of unrest, the government exercises power with popular consent, social order is preserved through positive interactions between the government and the population, human rights are guaranteed and citizens enjoy a peaceful life and equal opportunities to improve their living standards. The escalation of heavy-handed stability preservation measures has resulted in further social unrest due to pervasive rights violations, to which the population has responded with the rights defence movement. Feng highlights the trend that both rights defence by the Chinese population and stability preservation by the government in their current forms are approaching a dead end. The Chinese central government's policy of stability preservation has proved to be increasingly untenable, not only because of the escalating financial burden but also because stability preservation itself has become an excuse for corrupt officials to abuse power for personal gain and to eliminate any elements of the social and political progress that may ease social instability. On the other side, when citizens' demands and petitions for redressing grievances and abuses through legal processes have been met with more abuses by the government, the rights defence movement is blocked by the politics it tries to avoid.

The piece by Susan Trevaskes examines how public security authorities, central political authorities and the party rationalise the policing of

crime and protest and how they articulate the current stability situation in China in terms of handling “social contradictions” and “struggles”. The police are in the forefront of stability preservation campaigns. Coincident with Feng’s narrative, Trevaskes argues that there was a significant shift in policing priorities from “striking hard” at serious crime to “striking hard” at protests and civil dissent in 2003, when the rights defence movement emerged. With a focus on this “switch-over”, the article exposes the hypocrisy in framing “social conditions” according to Maoist dialectics of suppression and leniency in dealing with crime and elaborates on the contradiction in the state practice of stability preservation, which treats the supposedly “non-antagonistic contradictions” among the people as antagonistic contradictions between the enemy and the people. The article demonstrates that stability preservation has been articulated by the state not only as a precondition for the building of a “harmonious society” but also as a means of protecting the very future of the party’s hold on national power itself, given the intensity of social contradictions and struggles. The article ends with a suggestion that the intensity of stability-preserving operations in China is about protecting interests and that these interests are directly linked to the “struggle” between the party and groups in society that threaten its future *vis-à-vis* the future privilege and prosperity of its senior leadership.

Xie Yue’s article devotes itself to tackling the financial dimension of the stability preservation operations and provides an account and an analysis of how Chinese local cadres face a dilemma in performing their conflicting official duties under the pressure of preserving stability. Xie also takes 2003, when the Chinese government initiated a new fiscal reform, as a starting point. The Chinese government has tremendously increased its budget for domestic order and public security. However, the grass-roots governments in China have found it increasingly hard to finance their security operations. With rich statistical data and close observation, Xie demonstrates that the new funding reform catering to stability preservation has produced even heavier financial burdens, at least for the local governments in the poorer Central and Western China, among other reasons because the new funding usually engenders demands for matching investments from the local governments to complete the designated projects. The grass-roots governments have been required to keep any social unrest under control on the spot, but it is very expensive to finance intensive, widespread social control. Apart from normal expenditure for policing, additional costs include, but are

not limited to, payment for propaganda, monitoring and retrieving petitions, settling disputes and networking to eliminate the “records” of petitions with higher-level offices. Without sufficient funding from the official fiscal revenue, local governments are increasingly dependent on self-raised funds, which more often than not are generated through predatory measures such as land sales and fines. These predatory measures are likely to trigger popular protests, which, in turn, entail more expenditure to control. In other words, while the central government is pressuring the local government layer by layer to take on the growing tasks of preserving stability, the financial burden falls disproportionately on the grass-roots governments. Xie concludes that local governments in China will be weighed down unless the central government makes responsible political and legal changes to ease social and political tensions.

Maurizio Marinelli tackles the intellectual aspect of stability preservation, with a focus on the specific forms of power that are embodied in the properties and functions of formalised language, as was used by Jiang Zemin in crucial political documents on the party’s policy toward intellectuals. Embedded in discourse analysis, the article illuminates various possibilities for the normalisation and inculcation of formalised language in the understudied decade of the 1990s, when the mantra “without stability, nothing can be achieved” became a tautology. As capitalist practice by the CCP proved too difficult to reconcile with its communist ideology; the gap between the name and the reality had become unbridgeable due to the dissolution of any possible connection between political speech and reality. It came as no surprise that Jiang’s political discourse on intellectuals presented a serious ambiguity that blurred the three categories of reform, development and stability. Jiang was incapable of clarifying the precise relationship between the three categories and was at the same time deliberate in his efforts to obscure their relationship. Marinelli’s analysis also reveals the extreme involution/ devolution of the formalised language of the CCP in the Jiang Zemin era, when “preserving stability” was reaffirmed as a crucial concern of the party leadership, whose ultimate aim has been the safeguarding of its monopoly on power.

The article by David Kelly deals with a topic indirectly linked to the theme of stability preservation in assessing the ideological controversy over “universal values”. The rise to dominance of stability preservation in the political order coincided with a highly charged debate over “universal values”, and the closely related discussion of a self-styled “China model” that portrays “Western” democracy as irrelevant if not hostile.

David Kelly's essay analyses the critique of universal values as a "wedge issue" that is used to preempt criticism of the party-state by appealing to nationalism and cultural essentialism. It is telling that the universal values controversy was at its height between 2008 and 2011, when the global financial crisis strengthened belief in a putative "China model" in many official quarters, viewing China as a nation-state with its own destiny. The "China model" and "Chinese values" are promoted by the government and Chinese "New Leftists", who dismiss individual freedom and multi-party democracy as "Western" and intensify the party-state's claim to embody the fundamental national identity and its interests. Taking "freedom" as a case in point of a universal value, Kelly shows that, while it is more developed as a value "package" in the West, it has an authentic Chinese history with key watershed moments in the late Qing Dynasty with the reception of popular sovereignty, and during the high tide of Maoism that united the nation in a quest for liberation. The work of Qin Hui and Xu Jilin displays some of the resources contemporary liberals bring to these "de-wedging" universal values, not least freedom. Their common ground is their refusal to regard "Western" values as essentially incommensurate with and hostile to Chinese values, along with their clear sense of the irony involved in rejecting Western values while upholding Marxism, itself originating from Western values.

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The PRC Contract Law and Its Unique Notion of Subrogation

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Abstract: This paper briefly introduces a recent history of the development of the Chinese contract law. It then analyses various specific contract law issues including formation of the contract, liability for breach of contract and the notion of subrogation. This paper finds that PRC's contract law presents a hybrid version with key concepts from both Common law tradition and the Civil law tradition. This hybrid is however unique in the way of enforcing contracting parties' rights/obligations in many contract matters. Unfortunately, without a proper case recording system in the jurisdiction, the unique Chinese legal method is somehow difficult to solve complex contract issues. This paper then argues further that there is a need to update the current system in the law of contract, particular in dealing with the right of subrogation.

1 Introduction

The notion of subrogation has been developed and utilised in the area of contract law in the continental European countries for centuries. It is however not that widely used in the Common Law countries. The usage of subrogation in the Common law countries is basically limited in the insurance claim cases.

China, Chinese economy and PRC's legal system have started to be noticed by the world in the recent years, especially after China's entry into WTO in 2001, which makes a big event for the world economy. With the astronomical population and infinite domestic market, China started to show its charm in the global arena of the market-economy countries. Thus, there is no doubts that the study of PRC's legal system becomes crucial to understand and deal with this country.

Since the famous 'open door policy' was announced in the late 1970s, PRC has been witnessed in the past years with reforms happened in every corner of the country including bureaucracy, education, legal system, economy and even public's mindset(Jiang, 2002). These reforms have brought enormous changes to the country. More importantly, as one consequence of these reforms, Chinese legal system has adopted many features from both Common Law countries and the traditional Civil law countries. This massive adoption process in a comparatively short period of time has created a unique hybrid legal culture in China. Unfortunately, as a fundamental element and a crucial safeguard of trading, Chinese law and legal system has been criticized heavily due to its famous framework approach and ambiguity (W. Wang, 2007). The PRC's contract law is such an example. Although the law of contract is traditionally an area of law with some hardly avoidable uncertainties, unlike other legal areas in which state interests are more heavily involved and legal rules are more settled and certain, such as family relations, property and torts (Beale, 1909), the "China brand" (M. Zhang, 2006) contract law has been paying negative contributions to the trading with people from other countries.

Against this background, this paper will briefly introduce a recent history of the development of the Chinese contract law to set a context of discussion. It will then analyse various specific elements of the Chinese contract law, in particular, formation of the contract, liability for breach of contract and the notion of subrogation. This paper finds that PRC's contract law presents a hybrid version with key concepts from both Common law tradition and the Civil law tradition. This hybrid is however unique in the way of enforcing contracting parties' rights/obligations in PRC's jurisdiction. Unfortunately, without a proper case law recording system, the unique Chinese legal method is somehow difficult in solving complex contract issues. This paper then further argues that there is a need to update the current system in the law of contract, particular in dealing with the right of subrogation.

2 Context of the discussion - A brief history of Chinese Contract Law

As a trading nation for centuries, China did not have any specific laws governing the area of contract until 1981 when the first piece of legislation passed by the National People's Congress naming the Economic Contract Law of PRC (ECL). Before that, there were only a few regulations and ordinances made by the government, which seemed running the country's economy sufficiently during a period of time, when the country's economy was planned strictly by the government. The planned economy did not promote equal entities in trade and commerce,

the supply and demand were all strictly decided by the government; and the entire economy was self-reliance and there was no necessity to have establish law during that period of time (M. Zhang, 2006).

With the development of the nation, especially the changing culture in trade, the lack of specialised laws in the area of contract started to show its inconvenience and complications, which required a more operable and clearer instruction from the legislature. Against this background, in 1981, the National People's Congress passed the Economic Contracts Law of PRC. Moreover, two other important Laws were made consequently to govern some special contracts such as contracts with foreign interests and technology transaction contracts. The two laws were the Law of the PRC on Economic Contracts Involving Foreign Interests and the Law of the PRC on Technology Contracts.

The purpose of the Law of the PRC on Economic Contracts Involving Foreign Interests was to promote foreign trade and investment. It therefore drawn upon some "Western notions of freedom of contract and party autonomy." (Potter, 1992) Moreover, it specified that international treaties and practices were applicable to matters not covered by Chinese law, with the exception of PRC reservation.¹ However, at the meantime, the other two PRC contract related laws still retained many socialist vestiges, such as the sanctity of State ownership and the instrumental view of law. (F. Chen, 2001)

Development of domestic economy and the international trend of globalization required China to open up its market further and to provide some more sensible laws in the area of contract. Other elements were adding the necessity such as the inconsistency among these three pieces legislation as well as the overlapping contents. Responding to these problems, a decision was made by the State Council to do a substantial reform of the law governs the area of contract. As the achievement of this initiative, in 1999, the PRC enacted the Uniform Contract Law (UCL). The UCL was passed for the purpose of "protecting the legitimate rights and interests of the parties to contracts, maintaining the socio-economic order and promoting the socialist modernization."² It was believed that this promulgation of the UCL was especially important to China at the time because of China's then desire to join the World Trade Organization (WTO) (F. Chen, 2001). This new law also invalidated of those three laws simultaneously.³

Generally speaking, The UCL gives parties more freedom and flexibility in their contractual relations than existed prior to this enactment (Hitchingham, 2000). It also demonstrated the China's willingness to open its legal system to foreign influences and to receive inspirations from foreign laws.⁴

To provide a comprehensive understanding of this law and its implications to trading with China, some specific features of this piece of legislation were discussed in next part of this paper by comparing with the law of contract in the Common law tradition as well as UNIDROIT 2004.

3 The PRC Contract Law and its implications to trade

Structurally, the UCL is divided into three parts - General Provisions, Specific Provisions and Supplementary Provisions - with 23 Chapters featuring 428 Articles. The first part - General Provisions - has 8 Chapters: General Provisions; Conclusion of Contracts; Effectiveness of Contracts; Performance of Contracts; Modification and Assignment of Contracts; Termination of the Rights and Obligations of Contracts; Liability for Breach of Contracts; Miscellaneous Provisions. The second part - Specific Provisions - contains 15 Chapters dealing with 15 types of contract: Sales; Supply and Use of Electricity, Water, Gas or Heating; Donation; Loans; Lease; Financial Lease; Hired Works; Construction Projects; Transport; Technology; Storage; Warehousing; Mandate; Commission Agency; Intermediation. The Supplementary Provisions contain one Article on the effectiveness of the new Contract Law and provides for the abrogation of the three former Contract Laws.

In drafting the new Contract Law, the Chinese legislators referred extensively to the UNIDROIT Principles of International Commercial Contracts.⁵ Many Articles of the UCL, in particular those in the chapter on General Provisions, are similar in nature to the UNIDROIT Principles in Contract Law. Moreover, as mentioned above, the UCL also includes a set of specific provisions, which aims to provide a more practical guideline to the contract issues in specific areas.

¹ Article 142, the Law of the PRC on Economic Contracts Involving Foreign Interests

² UCL, art. 1 (PRC).

³ UCL, art. 428 (PRC).

⁴ Accordingly, UCL was firstly drafted by scholars familiar with the Civil Law system and then was amended by scholars from Common Law study background, many international conventions was heavily referred to as well, which was to maximise the capacity of this contract law to the vast cases coming from the commercial reality. The legal principles that Chinese legislators referred to including the Principles of International Commercial Contracts drafted by the International Institute for the Unification of Private Law (UNIDROIT Principles), the United Nations Convention for the International Sale of Goods (CISG), and other foreign legal standards. See for example, James C. Hitchingham, *Stepping Up to the Needs of the International Market Place: An Analysis of the 1999 "Uniform" Contract Law of the People's Republic of China*, 1 *Asian-Pacific Law & Policy Journal* 8: 4 (2000).

⁵ Here is the previous version of UNIDROIT, which was published in 1994.

Despite the similarities, many features of UCL are still alien for practitioners from other jurisdictions. In practice, there are still many other issues that can either complicate the use of this legislation or, even frustrate the overall process of seeking fair and justice in the country. Four specific aspects are therefore selected and examined below to provide a snapshot of these (unfamiliar) features, focusing on the contract issue and its implications to trading with China.

3.1 Sources of modern PRC contract law – where to find the laws

The sources of modern contract law in China includes the UCL, Chinese Civil Code, a serial of judicial interpretations handed down by the PRC Supreme court and an important special sources, which is named by this paper 'hidden' sources. The hidden sources are not the sources 'hiding' anywhere; they are the sources unclear and hard to find in practice, such as different levels of administrative regulations, rules, ordinances and guidelines. Interestingly, the hidden sources are, sometimes, very important and powerful 'laws' in dealing with individual cases.

The various sources are explained further below. Given the fact that UCL is to be discussed separately in the next part, it is not included here.

3.1.1 PRC Civil Code

Starting from the Chinese Civil code, which is a comprehensive code, governs every corner of people's daily life in the country. Being only a small part of this code, contract related provisions are covered by 6 clauses⁶. These clauses are very general in nature and, in many occasions, even difficult to understand.

For example, clause 113 in the Civil Code provides "If both parties breach the contract, each party shall bear its respective civil liability." Clause like this is of principle in nature. It neither provides any details on how the responsibilities can be defined in the breach, nor the method of calculation of liabilities suppose to be allocated respectively. They are therefore serving a mere purpose of showing the lawmaker's attitude towards the issue of breach of contract. Another example would be the clause 115, which provides 'a party's right to claim compensation for losses shall not be affected by the alteration or termination of a contract'. This clause is easy to create confusion in practice. In the situation where contract is terminated for a lawful purpose such as force majeure, surely, party's right to claim compensation would be affected. The same principle applies when the contract is altered with the consents of both parties.

Thus, generally speaking, when dispute arises in any given contract in the country, one would not possibly be able to rely on the Civil Code to solve the matter. The Civil Code is there, as it states in its clause 4, to 'provide the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility'.

3.1.2 The Doctrine of Precedent

Despite the fact that precedent is the most important source of the contract law in the Common law legal tradition and it is also an essential aid in solving international trade disputes under UNIDROIT International Commercial Contracts, precedent does not play an important role in the Chinese contract law system at all. In PRC, not all court decisions or cases are published and available to the public. In fact, the large majority remains unavailable (X. Wang, 2007). Although the Supreme People's Court, and the Standing Committee of the National People's Congress will occasionally make interpretations of various laws in which ambiguities are at issue, or clarification is deemed necessary by the Communist Party leadership, they are much less common than one would expect of courts in Common Law jurisdictions or international forums would provide.

There are reasons that the significance of precedent is not well taken in China. Understanding of these reasons can be helpful to a better understanding of Chinese contract law and its implications to trade. Some of the main reasons are discussed below.

Firstly of all, the judicial independence is traditionally a big problem in China. It is worth mentioning that judgments and the publishing of cases are highly political processes, and the courts are normally lack the necessary autonomy to render unbiased decisions that might conflict with Communist Party policy, values, or current laws (Farewell, 2006). Sometimes a case will be chosen to be published in order to make a point, or set an example for the public to build confidence in the judicial system. Other times, cases will be published to demonstrate the "rule of Law" to people from other jurisdictions, or to set forth new policies regarding foreign investment, or the activities of foreigners in China. In this sense, publishing UCL in year 1999 as a supporting measure for China's consequent WTO entry provides a good example. It is also well known that the government of China exerts strong pressure on the courts in cases to which they believe there is a national policy interest at stake, or to which they believe are politically sensitive. In addition, despite China's recent revisions of criminal law,

⁶ Article 111-116, PRC Civil Code

criminal procedure, civil law, and civil procedure, often trials are closed, conducted days after charges are filed, or even months or years later. Lawyers have been known to have been kept from their clients, or even kept from attending such politically sensitive trials altogether. Intimidation is also known to play a role, and many lawyers are unwilling to take on clients involved in trials considered sensitive, in order to protect their legal careers (Matheson, 2006). Thus, when practitioner from a Common law jurisdiction faces a dispute in China where he or she might want to cite a precedent (surely, there are precedents), the practicality of doing it is slim both on the likelihood of finding the proper authority and on accessibility in the litigation process even it is a case from an official source such as PRC supreme court case note database.

Secondly, it also deserves a mention that cases in China play an important role as a tool of the Ministry of Propaganda, not only in their decisions as to what gets published, but more importantly, as to what does not get published. Nonetheless, we feel it is important to publish here, some of the cases that the Chinese government feels the domestic and international communities should have access to. We know that they all convey some message to the public at large, however subtle it may be. The messages are always there as a result of a legal system without checks and balances, which is often used as a "tool" to convey messages or enforce a policy, rather than implement blind justice (Matheson, 2006).

Another unfortunate feature of Chinese case law is its infantile recording system. From the author's personal experience, it is interesting to browse one of the most popular case note databases, in fact, the only official case note database in China www.chinacourt.org⁷, which is set up by PRC Supreme Court. As people who can read both Chinese and English, the first interesting feature is the vast differences between the Chinese version and English version of this site. Many functions and information available on the Chinese site are not seen on the English site, which include the important case law database, anti corruption forum, free posting sections for website visitors and many current news. This situation can be caused due to a slow process of setting up English version for various sections; it can also be caused by unrevealed political reasons. As an experiment, the author of this paper tried to search within 'Civil litigation' database with any case with the word 'contract' in its title. The result of this search returned 3951 cases with a latest case in 2006 and oldest case in 20018. Unfortunately, many of these cases appeared in the result list neither have a clear date of trial and a clear court reasoning.⁹ Most of these case notes read more like newspaper stories rather than serious court cases.¹⁰ It is also interesting noting that photos of the parties in court hearing and/or in other scenarios have been published with many emotional in many of these cases in the database.¹¹ Nevertheless, all these clearly show that the case recording system in China is at its very infancy stage, which is due to both the traditionally under-recognized value of the case law approach and perhaps the lack of political wills. This situation reinforces the fact that different method should be adopted in solving trading issues involving contract matter when use Chinese contract law. The standard Western method of citing authorities (cases of statutes) and arguing the matter based on the authorities does not seemed to be the best way in China. Instead, as will be discussed in the particulars of the UCL, preparing an argument based on framework/principle of law rather than focusing on the application of law (previous cases) is recommended.

Lastly, one of the reasons that precedent does not hold great weight in litigation is due to the questionable qualification of Chinese judges. The Communist Party in China took office in 1945, which signified the establishment of a 'New PRC'. However, its judicial system had not been properly developed until 1978, when the Cultural Revolution finished (Mei, Fu, & Xu, 2002). Numerous reforms and restructurings of judicial system have been conducted by the State Government in the past decades, which achieved significantly in establishing the Country's court system (Tong, 2007). At the same time, the qualification of Chinese judges has been improved to a large degree. Unfortunately, in general, Chinese judges, as one special group of people in the country, is still not comparable to the judges in the Western countries in terms of the way of training judge, years of experiences before becoming a judge, skills of reason a judgment, the number of qualified judges and even the familiarity with the laws (A. Wu, 2007). This situation has created many uncertainties for people who are not familiar with the Chinese system (even for PRC practitioner sometimes), which is something that one needs to bear in mind in trading with the nation, at least in the near future where there is no sign of significant changes.

⁷ English version website is <http://en.chinacourt.org/index.php>

⁸ The trial was conducted while writing this paper on 16 May 2008.

⁹ An example of case without trail date can be found from

http://www.chinacourt.org/public/detail.php?id=300823&k_title=合同&k_content=合同&k_author=

¹⁰ Examples of newspaper story like case note are very commonly from this official case law database. For example,

http://www.chinacourt.org/public/detail.php?id=301499&k_title=合同&k_content=合同&k_author=

¹¹ An example of these cases can be found from

http://www.chinacourt.org/public/detail.php?id=301669&k_title=合同&k_content=合同&k_author=

3.1.3 Hidden Contract Laws

Apart from the sources above, there are many “hidden laws” functioning at the same time. The reason to call them “hidden laws”, as explained, is because these are something which unlikely or very difficult to be found without a great deal of research as well as a high level of familiarity with the Chinese legal and political system. However, these hidden laws are sometimes very powerful in dealing with individual cases.

In a simple term, these laws are ‘hiding’ in two different places. One is in other legislations or statute in the country and the other is in the vast administrative regulations, rules and ordinance and so on. There are many examples of this kind. For instance, the law of the PRC on Chinese-foreign Equity Joint Ventures (2001) is one of them, in which, many provisions are contract related.¹² As to the administrative part, policies, rules, regulations and ordinances from different levels of government are always referred in litigation as a major source of the law. Given the fact that there are more than 30 provincial level governments, hundreds of city councils and thousands of local councils, the volume of regulations and ordinances are considerable. Many of the contract related regulations could be found in this system. Sources of this kind are normally available in Chinese version only and rarely published in the place other than its local jurisdiction. Interestingly, these ‘so-called laws’ can be very powerful in dealing with the individual cases. For example, if a dispute arises regarding a manufacturing contract signed between a foreigner and a local Chinese provider in an administrative district, in Zhengzhou city, which is the capital of HeNan province in China. To solve the dispute, the court will need to look at the ordinance published by the authority in the district level, city level, provincial level and national level. Moreover, depending on the nature of the business, the court may also need to look at the laws in other areas such as foreign investment.¹³ (Li, 2007) Therefore, it is fair to say that the task of finding the hidden laws would be a ‘mission impossible’ for most foreigners, not to mention the big number of conflicts¹³ among these laws (L. Wang, 2008).

Thus, as practitioner who is not quite familiar with the system and not sure where to find the law, the task can be enormous. The best way is to get as much information as one can from the counter party of the contract at the contract drafting stage. Of course, seeking independent advice from local practitioners is absolutely crucial. Comparing with the Western way of doing a comprehensive research before signing a contract, in China, getting to know the people who know the law is much more important than getting to know the law by yourself. In the situation where a different point or conflicts in law or regulation is detected, which can be often, take the regulation or law made by a higher level of administrative body or decision-making authority.

3.2 The legislation – what the law looks like

UCL comprises of two main types of provisions, namely “the General Provisions” and “the Specific Provisions”¹⁴. The general provisions provide some contract essentials, including formation of the contract, contract effectiveness, performance, modification and termination etc. These essentials are applicable to all the contracts.¹⁵ Comparing with the general provisions, the specific provision is a list of specific types of contract, such as contract for sales of good, contract for donation, contract for financial leasing and construction contract etc.¹⁶

Reading the provisions while acknowledging the particular cultural, political and economic situation, one would be dazzled by the familiarity of most of the black-letter-rules, but one would be also amazed by some of the unexpected surprises that the law may provide. For example, Article 11 explicitly mentions that e-mails not only as a tool for contract conclusion, but also as a proof of writing. And, it has rules on the liability for misusing confidential information obtained during pre-contractual negotiations, Art. 43 UCL.¹⁷ (X. Wang, 2003)

One of the distinctive characteristics of this UCL is its significant similarity with the UNIDROIT Principles of international commercial contracts, especially the similarities between the UCL General provisions and the UNIDROIT Contract Principles. These similarities include, for example, the application of the rules, where both of these two documents chose to have a broad approach of what contract/s can be governed by the rules.

¹² Many contract related articles can be found in Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures (2001), including article 2, 14 and 15.

¹³ Article 14 of Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures (2001) provides that ‘in case of heavy losses, failure of a party to perform its obligations under the contract and the articles of association, or force majeure etc., the parties to the joint venture may terminate the contract through their consultation and agreement, subject to approval by the examination and approval authorities and to registration with the state's competent department in charge of industry and commerce administration. In cases of losses caused by a breach of contract, the financial responsibility shall be borne by the party that has breached the contract’. Article 94 of UCL provides that the parties may dissolve the contract under any of the following circumstances including, for example, force majeure, which does not need any approval by any authorities.

¹⁴ Although there is the Supplementary Provision in the Act, this paper is not discussing it because its insignificance of containing one Article only on the effectiveness of the new Contract Law and provides for the abrogation of the three former Contract Laws.

¹⁵ The general provisions in UCL are from article 1 to article 129.

¹⁶ The specific provisions in UCL are from article 130 to article 427, which include 15 different types of specific contract.

UNIDROIT Principles clearly stipulates in its Preamble that "these Principles set forth general rules for international commercial contracts." (UNIDROIT, 2004). It is further emphasised that "a broadest possible sense" should be used to understand the concept of 'commercial' contracts, therefore, its principles govern not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions such as investment and/or concession agreements, contracts for professional services and so on. (Y. Zhang & Huang, 2001). Moreover, there are many other similar principles in these two documents. For instance, regarding to the form of contract, UNIDROIT Principles states that "nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses."¹⁷ A similar provision can be found in UCL article 10, which provides 'the parties may conclude a contract in written, oral or other forms' and Article 11, further provides "'Written form" as used herein means any form which renders the information contained in a contract capable of being reproduced in tangible form such as a written agreement, a letter, or electronic text (including telegram, telex, facsimile, electronic data interchange and e-mail)'. Considering the fact that 'written contract' was the only recognised form of contract under the old PRC contract law system (before UCL 1999), there were no doubts that the UCL had made a big advancement regarding the recognised forms of contract, which is also consistent with the old Common Law tradition that oral contract is a possible form of contract. (Cusumano, Wiseman, & Christensen, 1996). Therefore, it is fair to say that this advancement definitely made UCL system linking with the International practices more closely.

Another interesting feature exists commonly between UCL and UNIDROIT Principles, which is the 'offer and acceptance rule'. This rule specifies that 'a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement'¹⁸ and/or 'the parties shall, in making a contract, take the form of offer and acceptance'¹⁹. It is clear that under these two documents, offer and acceptance makes a valid contract in most of the cases. More importantly, this rule is also similar with the formation provision in the United Nations Convention on Contracts for the International Sale of Goods (CISG), in which, art. 23 provides 'A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention'. (UNIDROIT, 1980). Thus, this paper takes a courageous assumption that the international trading system and its relevant rules has been aiming at simplifying and standardising the contract formation and its terms. Situation is, however, very different in the common law tradition, in which, any valid contract will need to have an essential element of 'consideration' (Cusumano et al., 1996). Not to comment on which is a more effective approach in practice, as a mere advice for practitioners familiar with the Common law system, arguing for the consideration issue of contract formation would be unwise and unnecessary when handling the conflicts involving Chinese contract law.

Responding to the question posed in the heading of this section – what the law looks like, a simple answer would be:

- The PRC contract law system looks messy, it appears everywhere and was mainly included in the UCL;
- With the simple language and straightforward provisions, the UCL is a reader friendly legislation and does not contain many legal jargons;
- The law is set out in a way very similar way with other international rules in commercial contract such as the UNIDROIT Principles and the CISG; and
- It also features some limited Common Law based principles such as party's autonomy.

3.3 Particulars of the UCL – what do you need to know

3.3.1 Formation of the contract

Studying into the basic elements of UCL, the law requires three elements must be present in order to form a contract: the parties²⁰, the agreement, and the object. In addition, according to Art 13 of UCL, contracts are formed according to an offer and acceptance model. An offer under the UCL is a "person's declaration of intention to conclude a contract with another person."²¹ This definition is very similar to many laws in other jurisdiction as well as provisions in international conventions.²²

¹⁷ Article 1.2 UNIDROIT Principles

¹⁸ Art. 2.1.1 UNIDROIT Principles

¹⁹ Art. 13 UCL

²⁰ The word 'parties' can be found throughout the UCL, which however, does not provide any information for unilateral contract.

²¹ Art. 14 UCL

²² UNIDROIT Principles, art. 2.1 - "A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement."

As explained, the rule of consideration appears nowhere in Chinese legal system both for simple contract and for formal deed. Some people believe that the difference of consideration does not create big problem because even in Common Law jurisdictions such as a country like Australia, formal contract and deed does not need consideration as well. But, without this principle, one should be very careful with things like “an open offer”, which does create complexity in practice (Matheson, 2006).

Always, in practice, things may not be as easy as it reads in the black letter law. Using the formation of the contract as an example, although it is clear that oral contract is an admissible form of contract in UCL, as a matter of fact, when use as an evidence, oral contract is more likely to be set aside by the court judges when decide on cases (Sui & Wang, 2007). In practice, oral contract is often used (or ‘misused’) to describe the finalising stage of a contract negotiation, basically means an agreement is reached orally, which will be followed (in most cases) by a formal contract (in written form) to give the effectiveness of a legal instrument (Li, 2007).

3.3.2 Liability for Breach of Contract

In Common law, there is a concept of “a genuine pre-estimate”. If one party of the contract can prove that the amount agreed on the contract represents a genuine pre-estimate of the loss likely to be incurred as a result of not being able to perform the contractual responsibilities, then that amount will be used by the court as the basis for assessing the loss and so the damages. For court to adopt this approach, party has to prove it is a “genuine pre-estimate” and it then will be for the court to examine the amount payable and to determine its nature.(Cusumano et al., 1996).

In comparison, Art.114 of UCL provides that ‘the parties may stipulate that in case of breach of contract by either party a certain amount of penalty shall be paid to the other party according to the seriousness of the breach, and may also stipulate the method for calculating the sum of compensation for losses caused by the breach of contract’, which is very different with the Common law principle that has been used by the courts for centuries.

Once more, this paper is not to comment on which is a better approach, merely, this would be a matter that the Common law lawyers need to be very careful about when they draft contract with PRC parties. For example, when draft a contract provision relating to the breach of contract and the amount of remedies/penalty, it would be beneficial to set out a clear amount under certain type of breach. If exact amount is difficult to specify at the stage of drafting, parties should consider to set out a method of calculation or at least a rough way of deciding the amount such as a percentage of the entire contract amount or each of the installment. Although the court can sometime reduce the specified amount of penalty by using its discretion, the possibility of this kind is not high. Same as to the increase, although Art. 114 provides a mechanism that party can get the set amount increased²³, the likelihood of getting this increase is slim as well. It is wise in practice to get the amount right early in the drafting stage and clearly stated in the contract.

3.3.3 Privity of the contract vs. the notion of subrogation

The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it (Cusumano et al., 1996). This seems to make perfect sense - only parties to contracts should be able to sue to enforce their rights or claim damages as such. However, the UCL provides the contrary. Art. 73 in UCL specifies that ‘if a debtor is indolent in exercising its matured creditor's rights and thus causes losses to the creditor, the creditor may apply to a people's court to subrogate the debtor's creditor's rights and exercise them under the creditor's name, except for the creditor's rights exclusively belonging to the debtor’. In other words, the term ‘subrogation’ gives right to a person who is not a party of a given contract to claim rights against the contracting party. For example, in the situation where party A owns party B 100 dollars, party B owns party C 100 dollars, and both debts are due. If party B is tardy in exercising it due creditor's right and refuse to pay 100 dollars to party C by saying he does not have money, party C would be in the position to sue A for the due 100 dollars on B's behalf. The notion of subrogation was adopted from many other authorities in the Continental European counties, such as in France Civil Code²⁴, Spanish Civil Code²⁵ and Italian Civil Code²⁶, Japanese Civil Code²⁷ also provides a similar notion, interesting to note that there is no such notion in the German legal system, which is where a dominating part of the PRC laws were originally adopted from (Snow, 2008).

When studying the law of subrogation, there are many common features between the traditional Civil Law and the Chinese approach, which mainly include the conditions of using the right of subrogation, the

²³ According to the Para 2, art. 114 of UCL, ‘If the stipulated penalty for breach of contract is lower than the loss caused by the breach, the party concerned may apply to a people's court or an arbitration institution for an increase.’

²⁴ Art 1686

²⁵ Art. 1111

²⁶ Art. 1234

²⁷ Art. 432

objective and approach of perusing this right. There are also unique characters of the Chinese approach in contract issues. This paper summarises them as below:

- Difference 1: The consequence of using this right of subrogation. Provisions in UCL and its related consequent Judicial Interpretation (1999)²⁸, show that the method of perusing the right of subrogation is (in China) for the “semi-creditor/3rd party²⁹” to claim a debt to a contracting party in a direct way. This “semi-creditor/3rd party”, in the situation with a successful claim, enjoys the result directly before return the access amount to the creditor (if there is access amount). Whereas in the Civil Law tradition, the “semi-creditor/3rd party” can only claim the debt on behalf of the real creditor – the real creditor is normally the contracting party. With the successful claim, the real creditor will enjoy the result and will need to pay the payable debt plus any relevant costs to the “semi-creditor/3rd party”, which is similar with the agency relationship.
- Difference 2: The method of using this right. UCL and its related consequent Judicial Interpretation (1999) specify that the right of subrogation can only be conducted with court order. Whereas in the Civil law tradition, it can be done privately for the due debts.

Thus, to provide a better understanding for people who are not familiar with the subrogation principle, it is worthwhile to summarize and compare the advantages and disadvantages of this notion in the PRC’s contract rules.

Advantages: There are advantages of having this provision in the contract law. First of all, this principle can be of incentive for semi-creditor to claim his or her due debt. Secondly, Chinese believe that this principle breaks a judicial black point where an enforcement is not possible for 3rd party (Y. J. Chen, 2000). It enables the 3rd party to make a claim by using his or her own name, which further enables the People’s Court to possibly freeze the account or withdraw the fund from the party at fault. Lastly, adopting of this principle leads to cost saving in transactions. The fact that the 3rd party enjoys the successful claim before the real creditor makes the transaction easier, comparing with the traditional approach where the 3rd party claims, creditor enjoys and pays 3rd party.

Disadvantages: China might be the only jurisdiction where the 3rd party can enjoy the claim before the real creditor, which can cause problems. Thinking of situation where there are more than one semi-creditors/3rd parties to one real creditor (the contracting party), if all the semi-creditors/3rd parties peruse their subrogation right, there will be major priority issue and fairness issue. In addition, there is only silence when the contract laws touch upon the situation of sharing of the successful claim among all the semi-creditors/3rd parties. Moreover, there has been no judicial interpretation regarding this issue (sharing the successful claim) yet. This paper therefore argues that the disadvantage overweight the advantages of this Chinese subrogation principle with the fact that there are not enough jurisprudence and authorities from domestic laws and overseas authorities in this point.

In conclusion, the notion of subrogation in UCL is an area to confuse the practitioners from other jurisdictions including those from the jurisdiction with the similar notion of subrogation. Although this topic has became a controversial issue for sometime, there have been no sign of removing this provision in the PRC laws.

3.4 Judicial interpretation

There is a common misunderstanding that in China, judicial interpretation does not have the legal binding authority. In fact, statutory interpretations made by the Supreme Court of PRC, the highest judicial body, does create binding authorities in practice (W. Wang, 2007).

In the area of contract law (after the UCL), there have been several judicial interpretations handed down from the Supreme Court or PRC. The most important one was the Interpretation of Issues relating to Contract Law of PRC 1999³⁰. It provided a more detailed instruction on understanding of the UCL.

The judicial interpretation in China comes in a similar format as the real legislation with numbered articles and provisions. For instance, the Interpretation of Issues relating to Contract Law of PRC 1999 comes with 7 chapters and 30 articles. Another example of judicial interpretation in the recent year was the Interpretation of Issues relating to the Construction Contract³¹, which comes with 28 articles and becomes effective from 1st Jan 2005.

However, the weight of judicial interpretation in China has traditionally been an unsettled issue. On the one hand, it is clearly stated in Article 4 of the Rules of the Supreme People's Court on the Work of Judicial

²⁸ The 1999 judicial interpretation will be discussed in detail in the later part of this paper.

²⁹ Here the ‘semi-creditor/3rd party’ is the party who is not in the contract.

³⁰ http://www.law-lib.com/law/law_view.asp?id=486

³¹ http://www.chinacourt.org/flwk/show1.php?file_id=97038

Interpretation³² that judicial interpretation is of the same weight as to the legislation; on the other hand, there are no other supporting authorities, and, especially, there is no constitutional foundation for that. In fact, the PRC Constitution makes it very clear that the validity of the law can only be gained with the consent of the People's Congress³³. Unfortunately, although there have been lots of debates regarding the validity and the legality of the judicial interpretations in litigation, there have been no clarification made by the authority so far (X. Wu, 2004).

Another controversial issue relating to judicial interpretation in China is the issue of "re-interpretation of the judicial interpretation" (Shan, 2007), which, as seen, has caused some huge amount of debates in practice (X. Wu, 2004). It basically refers to the situation where the PRC Supreme Court finds that it is necessary to clarify or revise some specific interpretations they made in the past by making new interpretations on the same or a similar issue. As one can imagine, with the unclear validity and effectiveness of the original judicial interpretation, the re-interpreted version will bring more complexity and confusion to the matter (Shan, 2007). To push this matter to another level of debate, this paper holds a view that judicial interpretation in China prepared and promulgated by the Supreme Court is, in its natural fact, illegal, or at least, unlawful. The body makes the interpretation (the PRC Supreme Court) does not have the legal authority to do so under the constitution and the very instrument makes the legal effect of the judicial interpretation, the Rules of the Supreme People's Court on the Work of Judicial Interpretation, is in conflict with the PRC Constitution, therefore, it should not be seen as a valid rule.

Unfortunately, none of these matters received any clarification from the lawmakers in the country. It has been nearly a decade since the UCL (1999) became effective. The way that PRC courts deal with the contract issues have not been consistent over the years, which have been criticized constantly and significantly (Zheng & Xin, 2008) but have not had any signs of possible amendments to date.

4 Conclusion

As revealed above, as a unique figure in the international trading circle, China, Chinese law and legal system present a different picture to the Common law world, and therefore, it is challenging to utilise this system when conflict arises in trading with this nation. Moreover, as an essential piece of legislation with particular importance to trade, the PRC contract law, with its different approach in legal principles and ambiguity in many provisions adds more complexity to the matter.

While convergence between China's contract law as written, embodied primarily in the UCL, and that of Western economic and legal systems has taken place, there remain variations in both coverage and emphasis (Matheson, 2006). Moreover, it remains unclear how Chinese contract law on the books translated to the law which had been applied or enforced, that mainly because of the immaturity of the case recording system in the country. The multiplicity of judicial forums, the variation in abilities of judicial decision makers, and the predilection to resolve disputes by means other than litigation all add to the uncertainty in this area. In addition, as noted previously, although Westerners view contract formation/signing as the culmination of the process, this is just the beginning of the process for the Chinese. Similarly, the process of exploring these differences in approach that marks the current status of contracting in and with China is just beginning as well. (Matheson, 2006).

This actually leads to the very point of this paper, when doing business with China, in general, finding the law and understanding the law is important. However, because the way that Chinese laws are structured, it is not only hard to find the law but also difficult to understand them. Even when one can understand the law (doubt if it can ever happen to a non-Chinese, or even Chinese), sometimes, it is still hard to use the law in practice because of its famous ambiguous and framework/principle approach, and also because of the lack of a proper case notes supporting system. At the same time, for those who have been doing business in China for a while, would understand no doubts, there is a thing that people always use in solving problems, which is the so-called 'Guan-Xi (the connections)'. Guan-Xi can, in fact, makes the business in China prosperous or vanishing. Therefore, the last advice for utilising the PRC contract law system is, as mentioned at the beginning of this paper in the introduction part, to know the people who know what the laws are and how the laws work in their own ways.

³² <http://www.court.gov.cn/lawdata/explain/etc/200703230020.htm>

³³ Article 58, Chapter 3 of PRC constitution states 'the law-making power is held by the People's Congress and the Standing Committee of the People's Congress only.'

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Mortgage Law in China: Comparing Theory and Practice

*Gregory M. Stein**

I. INTRODUCTION

China is in the puzzling position of developing free markets while still nominally subscribing to Communist ideology.¹ Nowhere is this tension more evident than in its real estate sector.² Developers are building award-winning office towers, modern shopping malls, and five-star hotels, and tens of millions of urban families are scraping together the money to buy their own apartments.³ At the same time, Communist doctrine prohibits private ownership of property, and all land in China still is owned by the state or by

* Woolf, McClane, Bright, Allen & Carpenter Distinguished Professor of Law, University of Tennessee College of Law (gstein@utk.edu). A.B. Harvard 1983, J.D. Columbia 1986. This article is based on a presentation I gave at a conference at the University of Missouri-Columbia School of Law honoring the career of Professor Dale Whitman. I would like to express my gratitude to Professor Whitman for being a fine mentor and role model to so many of us in the field of real estate finance. It was an honor to participate. Don Clarke, Jeanette Kelleher, Ben Liebman, Xiao Kai, and Xu Duoqi provided enormously helpful comments at different stages of my research on this paper. I am extremely grateful to the many real estate professionals, professors, and students in China who were willing to meet with me and share their experiences. I could not have written this article without their insight and assistance. Thank you to the University of Tennessee College of Law, the W. Allen Separk Faculty Scholarship Fund, Shanghai Jiaotong University Law School, and the Fulbright Scholar Program for supporting my research.

1. See XIAN FA [Constitution] pmbl. (2004) (P.R.C.) (“The basic task of the nation is to concentrate its efforts on socialist modernization by following the road of Chinese-style socialism.”).

2. See Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 1 (P.R.C.) (“This Law is formulated with a view to maintaining the national basic economic system and the economic order of the socialist market, clarifying the ownership of property [and] giving full effect to the meaning of property”); *id.* art. 3 (“During the primary stage of socialism, the State shall adhere to the basic economic system, with public ownership playing a dominant role and diverse forms of ownership developing side by side.”). See also Tudi guanli fa [Land Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004), art. 2 (P.R.C.) (“The People’s Republic of China adopts socialist public ownership of land, that is, ownership by the whole people and collective ownership by the working people.”).

3. The Property Rights Law establishes an ownership structure for apartments within a larger building that resembles the condominium form of ownership. Wuquan fa [Property Rights Law], arts. 70-83.

agricultural collectives.⁴ This doctrinal confusion does not seem to be holding back the real estate market, particularly in China's major cities, which have been booming for most of the last two decades.

China has adopted numerous written laws and regulations since the 1980s, but property law has lagged behind other areas of civil law. The first Chinese law focusing specifically on property rights became effective on October 1, 2007,⁵ which means that China's breakneck real estate development during the preceding two decades occurred in a nation with no published law of real estate.⁶ China has only haltingly begun to adhere to inter-

4. *Id.* art. 47 (stating, in somewhat circular fashion, "[t]he urban lands are owned by the State. Such rural land and the land on the outskirts of the city as belonging to the State according to law shall be owned by the State."). Other articles in this chapter confirm state ownership of "mineral resources, waters, [and] sea areas," *id.* art. 46, most "natural resources," *id.* art. 48, certain "wild animals and plants," *id.* art. 49, "[t]he radio spectrum," *id.* art. 50, certain "cultural relics," *id.* art. 51, "national defence resource[s]," *id.* art. 52, and certain "[p]ublic facilities like railways, roads, electric power, communications and gas pipes," *id.* The new statute clarifies that land "owned by the State" is owned "by the whole people." *Id.* art. 45. Note as well that the law prohibits the mortgaging of "[o]wnership of the land." *Id.* art. 184.

The new statute clarifies that certain natural resources are not owned by the state, but rather "are collectively-owned." *Id.* art. 48. *See also id.* arts. 58-63 (elaborating on the types of property that are collectively owned and discussing some attributes of collectively owned property); *id.* art. 184(ii) (generally prohibiting mortgaging of land use rights owned by collectives, even if occupied by "house sites, private plots and private hills").

5. Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (P.R.C.).

6. While the Property Rights Law bears an effective date of October 1, 2007, China had previously enacted other laws affecting legal rights to property. For example, the Land Administration Law was adopted in 1986, Tudi guanli fa [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004) (P.R.C.), and the Law on the Administration of Urban Real Estate was adopted in 1994, Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (P.R.C.). The 2007 Property Rights Law, however, is China's first legislation since before 1949 to address property rights comprehensively. *See generally* 3 CHINA BUSINESS LAW GUIDE 87, 151-52 (Kluwer Law Int'l 2005) (listing and summarizing Chinese laws pertaining to property rights).

One of China's first modern laws, the General Principles of the Civil Law, recognized the right to "possess, utilize, profit from and dispose of . . . property." Ming fa tong ze [General Principles of the Civil Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 71 (P.R.C.). *See generally* ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 248 (3d ed. 2004) (summarizing provisions of the General Principles of the Civil Law relating to property). But at the time the General Principles of the Civil Law became effective, "Chinese legal thinking about property rights . . . had not yet matured; there also existed ideological obstacles regarding

national rule-of-law standards, and there still is heavy reliance in China on *guanxi*, or personal relationships and connections.⁷ Chinese property rights also are limited by communitarian considerations in ways that are unfamiliar to Americans.⁸ These factors ensure that property law as it is actually practiced in China diverges from the published legal rules. Thus, those who have been buying, selling, and lending against Chinese real estate have been operating in a world of significant legal uncertainty.⁹ Moreover, while a newcomer to American law can learn much by reading statutes, cases, treatises, and academic articles, there are few similar sources in China.

This Article examines Chinese mortgage law as it actually operates in the field, focusing on both legal and business issues.¹⁰ During the summer of 2005, I interviewed dozens of Chinese and Western lawyers, bankers, real estate developers, government officials, judges, economists, real estate consultants, law professors, business professors, real estate agents, law students, and recent homebuyers.¹¹ Their comments offer reliable insights into how China's real estate markets truly function. The discussion that follows draws on these conversations to examine China's budding mortgage law practices,

whether the affirmation of property rights . . . would challenge the socialist principle of public ownership of the means of production." *Id.* at 249.

7. See, e.g., RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 20 (2002) ("the notion that the PRC economy will be able to sustain economic growth without further legal reforms that bring the system into greater compliance with the basic requirements of a thin conception of rule of law is doubtful").

8. See Wuquan fa [Property Rights Law], art. 7 ("The attainment and exercise of property rights shall comply with laws, social morality and shall not do harm to the public interests and the legitimate rights and interests of others."); *id.* art. 84 (2007) ("In the spirit of providing convenience for production, life of the people, enhancing unity and mutual assistance, and being fair and reasonable, neighboring users of the real property shall maintain proper neighborhood relationship.").

9. Yan Song, Gerrit Knaap & Chengri Ding, *Housing Policy in the People's Republic of China: An Historical Review*, in EMERGING LAND AND HOUSING MARKETS IN CHINA 163, 174 (Chengri Ding & Yan Song eds. 2005) ("Progress is impeded by the lack of an appropriate legal framework China's privatization has emphasized deregulation and decentralization, but a comprehensive legal framework for regulation of economic behavior in the emerging housing market has not yet formed.").

10. I have previously described the system of land use rights in China, which serves as a rough substitute for land ownership. Gregory M. Stein, *Acquiring Land Use Rights in Today's China: A Snapshot from on the Ground*, 24 UCLA PAC. BASIN L.J. 1 (2006). See also *infra* Part II. For a thorough comparison of Chinese and American mortgage law, see Dale A. Whitman, *Chinese Mortgage Law: An American Perspective*, 15 COLUM. J. ASIAN L. 35 (2001).

11. Some of my interviewees hold sensitive positions in government or banking and were quite candid in their remarks. Out of courtesy for the generosity of all who met with me, I have chosen to refer to all contacts anonymously.

including how they developed, how they comport with or differ from written laws, and what questions they leave unanswered.¹²

I first visited China as a Fulbright Lecturer at Shanghai Jiaotong University Law School during the spring of 2003. Amazed by the staggering scale of the real estate development in Shanghai, I became curious as to how China was succeeding in building new structures and rebuilding crumbling infrastructure so quickly in a partial legal vacuum. I returned two years later and conducted this field research into the legal and business grounding for the current Chinese real estate boom, interviewing a wide variety of experts in various segments of the Chinese real estate industry. These professionals come from a broad range of fields and backgrounds, with their only shared attribute being a willingness to meet with an inquisitive foreigner.¹³

Several features of the blossoming Chinese real estate sector quickly became apparent. These characteristics remind American lawyers interested in China that their assumptions about the American real estate industry will not necessarily apply in a nation with a strikingly different history and legal culture. First, the legal and business communities have fashioned their business

12. The classic example of field research into the development of informal norms is ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991). Professor Ellickson observes that “rural residents in [California’s] Shasta County were frequently applying informal norms of neighborliness to resolve disputes even when they knew that their norms were inconsistent with the law.” *Id.* at viii. He concludes from this that, “[i]n many contexts, law is not central to the maintenance of social order.” *Id.* at 280. See also Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 654-55 (1986) [hereinafter Ellickson, *Coase and Cattle*] (presenting earlier version of his field-research results).

13. For a thoughtful discussion of the biases that are inherent in this type of information-gathering about the Chinese legal system, see Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 11-14 (2005). Professor Liebman observes that personal introductions are critically important when conducting field research in China, a fact that unavoidably leads to biases that can affect research results. *Id.* at 13. See also Ellickson, *Coase and Cattle*, *supra* note 12, at 655 (“cooperative people were undoubtedly somewhat overrepresented in [my research] sample”).

Professor Donald Clarke has observed, “[f]ieldwork can yield interesting and original results, but unfortunately it typically does not yield representative statistics unless great care is taken in selecting the objects of study.” Donald C. Clarke, *Empirical Research into the Chinese Judicial System*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 164, 180 (Erik G. Jensen & Thomas C. Heller eds., 2003) (citations omitted). He also has noted how difficult it is to find reliable sources when conducting research into Chinese Law:

By piecing together information from [a wide range of] sources, Chinese and foreign scholars have been able to assemble a picture of certain aspects of the Chinese legal system. That picture is by no means complete. But fleshing it out requires a great deal of thought about what information needs to be gathered and how it can be gathered effectively.

Id. at 167.

approach largely from scratch. There is little received wisdom, today's leaders have few mentors on whom they can rely, and many so-called experts still operate by trial and error. Second, while China's market is more open today than it has been in at least a half-century, it is far from a free market. The government intervenes in all aspects of the economy to a degree that is surprising to the Western observer. Third, the legal system is not transparent, laws are not always applied and enforced as written, and there is much corruption. "Rule of law" is viewed by many Chinese as a Western construct designed to preserve Westerners' current advantage; it has not yet won its battle against "rule by man."

Fourth, China's legal system is a responsive one. Rather than adopting laws and regulations prospectively – an enormous task for a huge country that has been reforming its legal and economic systems rapidly and dramatically – the Chinese government often drafts them to address the crisis *du jour*. Meanwhile, China's creative business community continuously formulates new ways to approach new problems without waiting for formal government action. Market participants devise novel economic arrangements that subsequent legal developments expressly permit, or at least tacitly tolerate. The business community often seems to be prodding the government to act, and China's legal system must struggle mightily to keep up.¹⁴ In short, formal law lags behind actual practice.

Part II of this Article offers some historical and legal background. Part III examines the types of loans that are available to Chinese borrowers and the types of lenders that are making these loans. These lenders expect to be repaid, and Part IV raises the question of what assets a borrower has available to offer to a lender as security for that repayment. Part V continues by addressing the lending standards these lenders apply before they agree to extend credit. This analysis raises the more general question of where the lenders' funds actually come from, and Part VI discusses the ultimate sources of these funds. Part VII questions how stable the Chinese banking sector actually is, and Part VIII offers some concluding thoughts.

II. THE HISTORICAL AND LEGAL BACKGROUND

Mao Zedong led the Chinese Communist Party to power in 1949, but China arguably did not complete the nationalization of its land until 1982, six years after Mao's death.¹⁵ Ironically, market-based systems began to reap-

14. See Whitman, *supra* note 10, at 36 (describing some "features [of Chinese mortgage law] which are either uncertain in operation, or which are unnecessary stumbling blocks to the smooth and efficient functioning of the market in real estate financing").

15. See PATRICK A. RANDOLPH JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 11 (2000) (noting that nationalization of land in China was not completed until 1982). Jonathan Spence observes that early land reform efforts were extremely violent but intentionally incomplete. JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA

pear at about this time, hastened by Deng Xiaoping's rise to power during the late 1970s. Deng ignited China's "reform and opening" policy in 1992, causing the Chinese economy to begin growing rapidly from a nearly dead stop. The Chinese economic system, including its real estate sector, has developed quickly since then, with spectacular acceleration since the mid-1990s. Nonetheless, private ownership of land remained prohibited during this era of transition and still is forbidden today.¹⁶

China amended its Constitution in 1988 to read, "The right to the use of land may be transferred in accordance with the law."¹⁷ This provision does not permit private land ownership¹⁸ but does allow the government to grant land use rights for a specified term.¹⁹ The government thereby created oppor-

490-92 (2d ed. 1999) (estimating that at least one million landlords and family members of landlords were killed during the early stages of Chinese land reform, but noting that rich peasants often were left alone so that adequate food production could be maintained).

16. "According to Marxist theory, land is singled out as incapable of being regarded as a commodity, since it is not a product of man's labour – land exists by itself." Keith McKinnell & Anthony Walker, *China's Land Reform and the Establishment of a Property Market: Problems and Prospects*, in *THE IMPACT OF CHINA'S ECONOMIC REFORMS UPON LAND, PROPERTY AND CONSTRUCTION* 26, 31 (Jean Jinghan Chen & David Wills eds., 1999).

17. XIAN FA [Constitution] art. 10 (2004) (P.R.C.).

18. The sentence immediately prior to the one just quoted, which dates back to the original 1982 adoption of this Constitution, was retained without change and reads: "No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways." *Id.* See also Ming fa tong ze [General Principles of the Civil Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 73 (P.R.C.) (stating that "[s]tate property shall be owned by the whole people" and that "[s]tate property is sacred and inviolable"). The first two sentences of Article 10 of the Constitution indicate that urban land is owned by the state and that rural and suburban land is owned either by the state or by collectives. XIAN FA [Constitution] art. 10. These provisions, when read together, clarify that all land is state- or collective-owned, but that the state now holds the constitutional power to transfer the right to use land.

19. Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 7 (P.R.C.). The legal status of land use rights draws additional support from a constitutional amendment that became effective in 2004, with language that requires the state to pay compensation when it expropriates land. XIAN FA [Constitution] art. 10 ("The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned."). The Land Administration Law offers additional specificity about the legal status of land use rights. See Tudi guanli fa [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004), art. 2 (P.R.C.) ("No units or individuals may encroach

tunities for private development²⁰ while it also “avoided abandoning the Marxist principle of state ownership.”²¹ The maximum permissible term for a land use right is seventy years for residential property, forty years for commercial property, and fifty years for industrial and other types of property.²²

The party that acquires a granted land use right technically is required to develop the land within two years,²³ but the government often fails to enforce this deadline. Rights holders may pay an additional fee to extend the term, may initiate the barely acceptable minimum amount of construction before the two-year period expires, or may otherwise seek to extend the initial term. The initial and subsequent holders of land use rights may transfer these rights to others, within certain limits.²⁴ For example, in an apparent effort to head

on or transfer land, through buying, selling or other illegal means. The right to the use of land may be transferred in accordance with law.”).

20. For a discussion of the relationship between security of land tenure in China and economic growth, see Joyce Palomar, *Contributions Legal Scholars Can Make to Development Economics: Examples from China*, 45 WM. & MARY L. REV. 1011 (2004). See also Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003) (addressing relative importance of security of property and enforcement of contract rights).

21. STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 184 (1999). Later modifications to the Chinese Constitution reflect the uneasy relationship between private property ownership and Marxist doctrine. For example, the following language was added to Article 6 in 1999:

During the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the coexistence of a variety of modes of distribution.

XIAN FA [Constitution] art. 6. See also Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 3 (P.R.C.) (“The State shall consolidate and develop unswervingly the public sector of the economy and at the same time encourage, support and guide the development of the non-public sectors of the economy.”); Chengri Ding & Gerrit Knaap, *Urban Land Policy Reform in China’s Transitional Economy*, in EMERGING LAND AND HOUSING MARKETS IN CHINA, *supra* note 9, at 9, 14 (“As a milestone in the evolution of the Chinese Constitution, the 1988 amendment is significant, because it allowed the state to maintain ownership and at the same time promoted land market development without provoking political turmoil.”).

22. RANDOLPH & LOU, *supra* note 15, at 127-28. The constitutional amendment authorized the granting of land use rights, but the State Council established the actual durational limits by regulation. *Id.*

23. Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate], art. 25 (imposing penalty of up to twenty percent of fee paid for land use right if land is not developed within one year and allowing for forfeiture of land use right if land is not developed within two years).

24. Wuquan fa [Property Rights Law], art. 143 (“Except as otherwise provided for by law, the owner of the right to the use of land for construction use shall have the

off speculation in undeveloped land, the law prevents the initial holder of a residential land use right from transferring the right to a third party until it has constructed at least 25% of the proposed structure.²⁵

Despite some superficial similarities, the Chinese land use right differs considerably from the common law ground lease.²⁶ A party acquiring a land use right must pay the entire cost for that right in advance;²⁷ the holder of a land use right may not register that right until it has paid the fee in full,²⁸ at

right to transfer, exchange, make as capital contribution, donate or mortgage the right to the use of land for construction use.”); RANDOLPH & LOU, *supra* note 15, at 131-32 (discussing transferability of granted land use rights).

25. *See, e.g.*, Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate], art. 38 (prohibiting grantee from further transferring land use right before, “for housing construction projects, 25 percent of the total investment has gone through”).

26. *See* Whitman, *supra* note 10, at 38 (noting similarities and differences between Chinese land use right and Western long-term ground lease); RANDOLPH & LOU, *supra* note 15, at 18-19 (expressing belief that Chinese land use right is derived from German civil law concepts and not from common law ground lease).

27. Although several speakers made this claim, the only statutory support I could find for it is equivocal. Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate], art. 38 (“The transfer of real estate with the right of land use shall comply with the following conditions: (1) All the fees in concern with the lease of the right of land use have been paid in accordance with provisions prescribed by the contract for the lease and the certificate of the right to use the land has been obtained.”). Implicit in this language is the suggestion that the contract might provide for payments over time. One Chinese lawyer indicated that the practice requiring advance payment in full has recently been modified and that some owners have been permitted to pay the fee on a periodic schedule that is similar to regular rent payments. This newer method allows the government to spread out its receipt of the income from the sale of the land use right over a period of time.

28. RANDOLPH & LOU, *supra* note 15, at 152. The new Property Rights Law addresses registration. Wuquan fa [Property Rights Law], arts. 9-22, 139. Article 139 provides, “[t]he right to the use of land for construction use shall be set upon registration.” *Id.* art. 39. *See also* Tudi guanli fa [Land Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004), art. 12 (P.R.C.) (“Any change to be lawfully made in land ownership, in the right to the use of land or in the purpose of use of land shall be registered.”); Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate], art. 35 (requiring registration of ownership of real estate when it is transferred or mortgaged).

The registration requirement also applies to mortgages. *See* Danbao fa [Guaranty Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 30, 1995, effective Oct. 1, 1995), art. 41 (P.R.C.) (“Where a party mortgages [certain types of] property . . . , he shall register the mortgaged property, and the mortgage contract shall become effective as of the date of registration.”); *id.* art. 43 (“Where a party mortgages other [types of] property, he may of his own will, register the mortgaged property, and the mortgage contract shall become effective as of the date of execution.”). There are incentives to register mortgages even when registration is

least in some parts of China, the purchaser apparently may not use borrowed funds for the acquisition of a land use right; the land to which use rights are granted must be developed within a fixed amount of time or the right is forfeited, as just noted; there are official limits on the transferability of land use rights, also as just noted; the holder of the land use right must own the building constructed on that land;²⁹ and land use rights are not subject to landlord-tenant law.³⁰ The Chinese land use right thus is not a ground lease.³¹

optional under Article 43 of the Guaranty Law. *See id.* (“If a party does not register the mortgaged property, he may not defend against the claims of third party [sic].”).

The provisions of the new Property Rights Law appear to mandate registration of mortgages in all cases. *Wuquan fa* [Property Rights Law], art. 187 (“Where a party mortgages assets [including houses and land use rights], he shall register the mortgaged property, and the mortgage contract shall become effective as of the date of registration.”). *But see id.* art. 199(iii) (referring to claims secured by unregistered mortgages). These provisions of the new Property Rights Law take precedence over any contradictory portions of the earlier Guaranty Law. *Id.* art. 178 (“In case of any discrepancy between the Guarantee Law [sic] of the People’s Republic of China and this Law, this Law shall prevail.”). *Cf. id.* art. 8 (“Where there are laws stipulated otherwise in respect of property rights, such laws shall be observed.”).

29. *Wuquan fa* [Property Rights Law], art. 142 (“The ownership of the building, structure and their accessory facilities built by the owner of the right to the use of land for construction use shall belong to such owner, unless there is evidence to the contrary sufficient to invalidate that.”); *id.* art. 146 (“Where the right to the use of land for construction use is transferred, exchanged, made as a capital contribution or donated, the buildings, structures and their accessory facilities affiliated with such land shall be disposed of accordingly.”); *id.* art. 147 (“Where the buildings, structures and their accessory facilities affiliated with a land for construction use is transferred . . . [or otherwise conveyed], the right to the use of such land for construction use as being occupied by such buildings, structure and their accessory facilities shall be disposed of accordingly.”); *id.* art. 182 (“Where houses are mortgaged, the land use right to the construction lot occupied by the houses shall be mortgaged at the same time. Where the land use right to the construction lot is mortgaged, the houses fixed on the land shall be mortgaged at the same time.”); *Chengshi fangdichan guanli fa* [Law on the Administration of Urban Real Estate], art. 31 (same). *See generally* JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK* 739 (2d ed. 2005) (discussing this issue in context of registration of real estate transfers). *See also infra* notes 47-50 and accompanying text (addressing this issue in context of construction lending).

30. *See* RANDOLPH & LOU, *supra* note 15, at 125-26 (emphasizing that most of Chinese landlord-tenant law does not apply to holders of granted land use rights); *cf.* INVESTMENT IN GREATER CHINA: OPPORTUNITIES & CHALLENGES FOR INVESTORS 105 (CCH Asia eds., 2003) (observing that Chinese land use right displays elements of both leasehold interest and contract right).

31. It should be evident from this discussion that the Chinese land use right is both similar to and different from the Western ground lease. Because Chinese land can be owned only by the government and because ownership of a land use right carries with it ownership of the improvements on that land, the granting of a land use right by definition severs ownership of the land from ownership of the building constructed on that land, just as the Western ground lease does. But because the holder

One obvious question about China's current system of land use rights is what happens to the land use right and the structures on the land when the term of the right expires.³² Since the system of land use rights is only about two decades old while most land use rights are granted for periods of forty years or more, China's legal system and real estate market have had little occasion to address this question so far. It is reasonable to assume, however, that even if Chinese government entities are not required to renew land use rights that are nearing their expiration date, they will be willing to negotiate extensions of these rights in exchange for the payment of a periodic or one-time fee. Pressure to implement such a policy is likely to increase as the first wave of land use rights begins to approach its expiration date and the holders

of a Chinese land use right is required to own the improvements on that land, *Chengshi fangdichan guanli fa* [Law on the Administration of Urban Real Estate], art. 31, the developer must incur the capital expense of acquiring the land use right in its entirety at the beginning of the construction process. The ground lease structure, by contrast, allows the developer to avoid all or most up-front land acquisition costs. The Chinese land use right, in short, is not a financing device.

32. The new Property Rights Law appears to require the government to renew the land use right, at least for residential property. *Wuquan fa* [Property Rights Law], art. 149 (stating, "[t]he term of the right to the use of land for building houses shall automatically renewed [sic] upon expiration," while noting that for other uses, the right "shall be renewed according to laws and regulations upon expiration"). This provision does not address the duration of the renewal term, the question of whether the holder of the right must pay an additional fee, or the issue of how any such fee will be calculated.

Cf. *Chengshi fangdichan guanli fa* [Law on the Administration of Urban Real Estate], art. 21 (providing that (i) holder of land use right that wishes to extend it must apply for such an extension no later than one year before right expires; (ii) such applications "shall be approved"; and (iii) land user shall execute a new contract "and pay fees accordingly for the use in accordance with the provisions"). This article of the statute does not clarify what the duration or price of the extension shall be. *Id.* Professors Randolph and Lou have argued that this article requires the government to renew, effectively giving the holder of the land use right a right of first refusal, but Article 21 does not specifically state this. *Compare* RANDOLPH & LOU, *supra* note 15, at 128-29, *with* *Chengshi fangdichan guanli fa* [Law on the Administration of Urban Real Estate], art. 21. One expert suggested to me that a more accurate translation of Article 21 is that these applications "should be approved," which implies a greater level of government discretion. *Cf.* *Chengshi fangdichan guanli fa* [Law on the Administration of Urban Real Estate], art. 21. Also noteworthy is Article 58 of the Land Administration Law, which states that the government may re-take land formerly subject to land use rights if the holder of the right fails to seek an extension "or, if he has, [and] the application is not approved." *Tudi guanli fa* [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004), art. 58(3) (P.R.C.).

of those rights discover that lenders have become unwilling to finance construction or renovation on the land.³³

The amount of this extension or renewal fee could fall within a wide range.³⁴ At the high extreme, the fee could amount to an annual payment equal to the fair market rental value of the land at the time of the renegotiation, perhaps with periodic increases built in (or, equivalently, a one-time fee that is equal to the discounted present value of this rental stream over the duration of the extension period). Land use rights renewed under such a system would resemble Western ground leases to a somewhat greater extent than current Chinese land use rights do, with the government serving as ground lessor. At the low extreme, the government might seek only a small percentage of the value of the land each year. If this occurs, China will have adopted a real property revenue-generation system not unlike that followed in much of the United States. Under this regime, holders of land use rights could maintain their occupancy for the duration of the renewal term on the condition that they make regular payments to the government in an amount that is far lower than the rental value of the property. The fee a Chinese right-holder would pay to maintain its land use right would be loosely analogous to *ad valorem* real property tax payments in the United States. If these rights were renewable indefinitely, the holding of a land use right would be tantamount to ownership.

The Chinese land use right system also functions as a zoning arrangement to some degree. When the government announces the availability of land, it places limits on the uses it will permit for that land, and it restates these limits in the written document that it executes with the eventual purchaser of the land use right.³⁵ The government thereby achieves by contract what American jurisdictions accomplish under a variety of land use laws. The establishment and transfer of land use rights is not the only method of land use control in China – and land that is not subject to land use rights is not restricted by these types of controls at all – but the land use right serves as one component of an overall land use system.³⁶ Moreover, the division of

33. See Whitman, *supra* note 10, at 38 (noting the “general expectation that granted land use rights will be renewed upon their expiration”).

34. See, e.g., McKinnell & Walker, *supra* note 16, at 33 (suggesting that Hong Kong’s method of addressing this issue so far has been more effective than China’s).

35. See RANDOLPH & LOU, *supra* note 15, at 391-92 (setting forth provisions regulating land use that are included in an official form of contract for granting of land use rights on state-owned land).

36. For more on the regulation of the use of land in China, see generally Tudi guanli fa [Land Administration Law]. For instance, Article 17 of the Land Administration Law requires that governments at all levels “draw up overall plans for land utilization . . . for national economic and social development, the need for improvement of national land and for protection of the natural resources and the environment, the capacity of land supply, and the demand for land by various construction projects.” *Id.* art. 17.

land into government-owned land and land owned by agricultural collectives also serves as a rudimentary form of zoning.³⁷

III. TYPES OF LOANS AND LENDERS

Commercial loans in China, much like those in the United States, come in two varieties and serve two different objectives. A developer may seek a project loan, which is essentially a construction loan, and also may seek a cash-flow loan to be used for daily operation of the completed building, which resembles the American permanent loan. Project loans usually are issued for a term of twelve to eighteen months, suggesting that construction schedules in China are extremely fast, and certainly much faster than in the United States. Any visitor to China can attest to the fact that developers erect buildings very quickly. Construction sites often operate – noisily – twenty-four hours per day, seven days per week, with plenty of willing laborers from the provinces to keep projects moving ahead unrelentingly.

Project loans are disbursed in periodic installments,³⁸ but borrowers sometimes can negotiate for a modest amount to be advanced initially in a lump sum. Although project loans are available for terms of more than twelve months, one developer explained that his company prefers loans with a term of no more than twelve months because the loan then is considered a short-term loan. Short-term loans require the borrower to meet fewer application formalities and are less closely supervised. If construction ends up taking longer than the projected twelve months, it is relatively straightforward for the borrower to obtain an extension of the term of the project loan,

37. One expert observed that some agricultural collectives own land that has been converted to commercial uses. This land frequently is located in suburban areas where the neighboring city has sprawled, raising the value of the collective's agricultural land and making it more attractive to commercial developers. The collectives fear that if this land is requisitioned by the state and converted from allocated to granted land, the developer or the state will enjoy the profit that results from converting farmland to commercial use. Some of these collectives have received permission to build commercial structures on their allocated land themselves. This places them in a position in which they can retain the profits resulting from the change in land use and pass them along to the members of the collective in the form of dividends. See also RANDOLPH & LOU, *supra* note 15, at 61 n.8 (discussing this phenomenon). Note, however, that collective-owned land may not be mortgaged. Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 184(ii) (P.R.C.); Danbao fa [Guaranty Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995), art. 37(2) (P.R.C.).

38. See Danhao fa [Guaranty Law], art. 59 (defining "[a] mortgage of maximum amount" as a mortgage of property "to secure the creditor's claims which occur successively during a given period of time and to the extent of the total amount of the claims"). See also Wuquan fa [Property Rights Law], arts. 203-07 (addressing, but not defining, mortgages of maximum amount).

thereby avoiding the stricter regulations that would have applied had the developer sought a longer-term loan from the outset.

Cash-flow loans generally are not relevant to the construction of residential buildings, as the developer conveys the residential units upon completion of the building and the individual residential buyers secure their own financing. For commercial buildings that are to be rented out, cash-flow loans with a term of three to five years are common,³⁹ and the same lender that provided the project loan for the building frequently will extend the subsequent cash-flow loan to the developer. Interest rates tend to be lower for cash-flow loans than for project loans, presumably reflecting the lower risks of holding developed property as compared to developing it.

Despite the availability of cash-flow loans, one developer explained, developers would prefer to sell units, even in commercial buildings, rather than retain them. This preference may reflect a belief that the market is near its peak now and there is nothing to be gained by waiting to sell. Whether the developer plans to sell the completed units or retain them, defaults on project and cash-flow loans are rare, because property values have been increasing steadily. Property owners thus have both the incentive and the ability to keep their loan payments current.

The experts I met all agreed that commercial real estate lenders are almost exclusively domestic mainland Chinese banks. Other loan funds come from lenders in Taiwan and Hong Kong. Nations with large expatriate Chinese populations, such as Australia, Canada, and the United States, also serve as significant sources of mortgage loan funds.

Residential loans pose particularly interesting issues. By all accounts, prices for residential real estate in Shanghai far exceed what the typical buyer ought to be able to afford. Yet buyers keep buying and lenders keep lending, and the default rate has remained low. Nearly every person I spoke with confirmed that lenders require verification of official income before they will lend to a residential buyer, and nearly all of these people agreed that the income statements employers supply to lenders often overstate the typical applicant's income significantly. (One Chinese expert vehemently disagreed, insisting that a typical bank analysis was more rigorous than this.) While most lenders recognize that these statements probably are unreliable, they make these residential loans anyway and merely require the untrustworthy documentation for their files. Lenders, in short, routinely extend credit fully aware that the actual official income of the average borrower to whom they lend will be insufficient to cover the monthly loan payment. In addition, there are no national credit reporting agencies in China, which means that

39. As foreign lenders have entered this market, the terms for cash-flow loans have begun to increase. One foreign lender is reportedly extending permanent loans with twelve-year terms.

lenders have no dependable means of assessing the overall financial reliability of their loan applicants.⁴⁰

So how do residential buyers make their payments? To begin with, reported income is only part of the story for most Chinese. In addition to the income reported from their official – and therefore taxable – jobs, many workers earn “gray” income from various sources. As I heard repeatedly, this income usually is in cash, some of it may not be legal, and nearly all of it goes untaxed by the government. Lenders assume, and perhaps receive informal assurances, that their borrowers have other sources of income that cannot be officially verified. In addition, borrowers frequently obtain short-term loans from family members to help them make their regular payments on their acquisition loans. Thus, the purchase of a residential unit becomes a family affair, and several generations may be contributing to the purchase.

With home prices appreciating as rapidly as they have in the past several years, many buyers are making their purchases largely for investment purposes. If their loan payments become more than they can handle, they can sell their apartments quickly and at a significant profit. In fact, I heard over and over of investors who buy multiple residential units with the idea of selling them within a few months. These buyers do not expect to rent the apartments out, and many units lack such basic features as interior doors and plumbing fixtures. The owners hold these apartments empty and wait a few months while the property appreciates. As a result, many of the new residential units in Shanghai have never actually been occupied. These apartments are commodities, not residences.

The murkiness and unreliability of lending standards, particularly for residential loans, probably goes a long way toward explaining why a secondary market in real estate loans has not yet developed in China.⁴¹ Some Chinese real estate experts were simply unfamiliar with the concept of a secondary mortgage market, and several greeted my inquiries about such a market with “*mei you*,”⁴² signifying “we don’t have this.” Other experts seemed keenly aware of the absence of a market in which residential mortgage loans can be securitized and the need for such a market, with one professor explaining that the government previously had prohibited the securitization of mortgage loans,⁴³ a policy it has recently taken steps to reverse. Several experts

40. I was told that this problem exists to an even greater degree in the growing automobile loan industry, with lenders having great difficulty tracking down this mobile collateral after a borrower defaults.

41. See generally Whitman, *supra* note 10, at 57-58 (describing beneficial features of secondary mortgage market).

42. This universal response translates literally as “don’t have,” but I quickly grasped that this multi-purpose rejoinder can signify anything from “I don’t understand” to “don’t bother me.”

43. This professor implied that the government wants the lenders’ percentage of nonperforming loans to go no higher than it currently is. By compelling banks to

stated that there have been securitizations in China, but upon further questioning, it appeared that they were actually speaking of participations: in every such case, the speaker was referring to the sale of fractional interests in a large mortgage on a single property rather than the issuance of securities backed by a pool of smaller mortgages.

Given the low rate of residential loan defaults during the past decade – an era in which the number of homeowners has mushroomed – banks simply may not see any reason to reduce or spread the risk of holding a portfolio of individual mortgage loans. A small group of lenders controls a huge share of the residential market, and these lenders may see little need to sell loans to raise cash when they already hold enormous reserves of depositors' savings.⁴⁴ The government appears to recognize the value of securitization and the ways in which the availability of securitization would ease overall access to credit and help smooth out regional disparities in the availability of funds. Several speakers referred to new tax and accounting policies dating back to 2005 that are designed to encourage the growth of a secondary mortgage market, and one spoke of an increase in the number of domestic ratings agencies. This seems to be one area in which foreign participants in the Chinese real estate market will have many skills and much experience to offer. However it happens, China soon may see the growth of a secondary mortgage market. So far, though, the Chinese real estate industry has been able to flourish without one.

IV. WHAT DOES THE BORROWER HAVE TO OFFER AS SECURITY?

Developers in China, like those in the West, would prefer to limit their personal risk and maximize their leverage by borrowing funds. They may take advantage of several direct and indirect sources of loans. To a certain extent, they may be able to mortgage their land use right to a lender in exchange for funds to be used for the acquisition of that right or the development of a structure to be built on the land.⁴⁵ They can mortgage the partially

retain their most desirable loans, the government helps to ensure that the banks maintain or improve the overall quality of their portfolios.

44. See *infra* note 72 and accompanying text.

45. As a first approximation, it is correct to say that Chinese legal usage of the term "mortgage" is similar to American usage. Article 33 of China's Guaranty Law states:

Mortgage as used in this Law means that the debtor or a third party secures the creditor's rights with property listed in Article 34 of this Law without transference of its possession. If the debtor defaults, the creditor shall be entitled to convert the property into money to offset the debts or have priority in satisfying his claim from the proceeds of auction or sale of the property

Danbao fa [Guaranty Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995), art. 33 (P.R.C.). Both this Article and

completed building to a bank. The developer can pre-sell units – in particular, residential apartments – and require that each buyer pay a deposit to reserve a unit. This prepayment is, in essence, a loan from the buyer to the developer to be used to finance construction. And developers frequently delay payments to contractors, forcing these contractors to finance construction involuntarily.

Different experts provided different answers to the question of whether banks would lend in return for receiving a mortgage on an unimproved land use right. One Chinese lawyer stated that lenders will not lend funds to developers to pay for the granted land use right itself. The buyer must pay the government in full with its own cash when the buyer acquires the right. Lenders simply are unwilling to lend until they know that the borrower already has acquired the land use right. A Chinese developer confirmed this point with respect to Shanghai, but indicated that the practice differs in Shenzhen, another booming real estate market. One law professor disagreed with the lawyer, stating that developers are permitted to mortgage an unimproved land use right in order to obtain a loan for the development of the structure to be built on that land. Perhaps that professor was recognizing that such loans are legally permissible, without commenting on whether banks

Article 179 of the Property Rights Law define “mortgagor,” “mortgagee,” and “mortgaged property,” and the latter provision states that “if the debtor defaults, the creditor shall have priority in satisfying his claim from such [mortgaged] property.” Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 179 (P.R.C.). *See also id.* art. 143 (“Except as otherwise provided for by law, the owner of the right to the use of land for construction use shall have the right to transfer, exchange, make as capital contribution, donate or mortgage the right to the use of land for construction use.”); *id.* art. 170 (“Unless otherwise stipulated by laws, holder [sic] of security interest shall have priority in satisfying its claim if a debtor defaults in its obligations.”).

Article 180 of the Property Rights Law lists seven different types of property that may be mortgaged, including houses and land use rights, while article 34 of the Guaranty Law lists six different types, with much overlap between the two groupings. Wuquan fa [Property Rights Law], art. 180; Danbao fa [Guaranty Law], art. 34. Leaseholds are not specifically enumerated on either list and apparently are not mortgageable. *See RANDOLPH & LOU, supra* note 15, at 244-46 (discussing desirability of permitting leasehold mortgages). Note again that “[i]n case of any discrepancy between the Guarantee [sic] Law of the People’s Republic of China and this [Property Rights] Law, this Law shall prevail.” Wuquan fa [Property Rights Law], art. 178.

Other types of mortgageable property include items that would be considered personality in the United States, and thus not subject to mortgage law. *See, e.g.,* Danbao fa [Guaranty Law], art. 34(2), (4) (listing such items as “machines” and “means of transport”). But note that separate chapters of the Property Rights Law and the Guaranty Law address pledges. Wuquan fa [Property Rights Law], arts. 208-22 (addressing pledges of “movables”); Danbao fa [Guaranty Law], arts. 63-74 (same); Wuquan fa [Property Rights Law], arts. 223-29 (addressing pledges of “rights,” including commercial paper, securities, and intellectual property); Danbao fa [Guaranty Law], arts. 75-81 (same).

routinely grant them.⁴⁶ Or perhaps banks are willing to lend against a land use right if the funds are to be used for construction, which means that the value of the security will be increasing, but not if they are to be used for acquisition, where the value of the security remains constant. In the first of these two cases, however, the lender presumably is receiving a mortgage on the improvements and not just on the naked land use right.

These potentially inconsistent responses collectively suggest not just that each professional's experience with the application of these rules and policies is different, but also that bank policies and government regulations continue to evolve over time and vary from place to place within China. Frequent changes in the rules may reflect the degree to which the government wishes to encourage or discourage development as the market matures, as well as the accrual of experience over a relatively brief span of time. I was told by one developer that it was possible several years ago for a developer to function by mortgaging a land use right as security for the loan used to purchase that right, without contributing any of its own money. If this comment is accurate, it suggests either that banks were willing to live with 100% loan-to-value ratios at the time because the government was struggling to encourage private development or, perhaps, that government entities were selling land use rights for less than their true fair market value.

In the current, overheated climate, mortgage loans that may once have been available for developers to acquire land use rights appear to have become scarce, as state-controlled lenders try to cool the market gradually. Banks may have come to the realization that they have been shouldering too much development risk and now may be seeking to place more of this risk on their borrowers. Note also that government entities that are selling land use rights may impose their own requirements, on top of any applicable bank limitations, as a means of slowing down the pace of development. To illustrate, one expert advised me that interested bidders now must deposit 30% of the estimated value of the land use right with the government before they qualify to bid on it.

Whether or not banks will extend loans secured by mortgages on undeveloped land use rights, they will lend for the construction of the building itself and will insist on receiving a mortgage on the improvements.⁴⁷ Improvements are mortgageable, and a mortgage on an existing building automatically creates a mortgage on the underlying land use right.⁴⁸ This point

46. There does not appear to be any legal prohibition on such a loan. Wuquan fa [Property Rights Law], art. 180 ("The following property . . . may be mortgaged: . . . (ii) Land use right to building lot . . .").

47. See RANDOLPH & LOU, *supra* note 15, at 247-48, 253-54 (discussing how mortgages operate when securing future advances used to construct improvements). See also *supra* Part III (discussing project loans).

48. See, e.g., Danbao fa [Guaranty Law], art. 36 (stating that mortgage on either land use right or residential improvements on that land automatically creates mortgage on both). Cf. Wuquan fa [Property Rights Law], art. 200 (noting that mortgage

further demonstrates that the Chinese land use right and the Western ground lease function in quite distinct ways, despite some apparent similarities.⁴⁹ The ground lease allows the Western developer to operate without the need to acquire fee title to the underlying land, so that the lease functions as a financing device. By contrast, the Chinese developer must purchase the underlying land use right at the outset and, as just noted, may be unable to finance this purchase. This distinction serves as a reminder that the principal purpose of the Chinese land use right is to allow the Chinese government to sever official state ownership of the land from the private right to develop it. It also reminds the Western observer yet again of the uneasy tension in China today between the private right to develop property and the socialist conception of common ownership of land.⁵⁰

When banks are considering whether to lend, they require the loan applicant to submit four documents: (1) the land certificate from the government, evidencing that the borrower is the holder of the land use right; (2) the zone certificate, indicating that the height and bulk of the proposed building comply with the requirements of the applicable architecture zone;⁵¹ (3) the land zone certificate, demonstrating that the proposed use is permissible in that land zone; and (4) the construction permit, which authorizes construction.⁵² These documents are analogous to an American developer demonstrating that they hold title to the property, that their plans comply with all applicable zoning laws, and that they have received a building permit. Although banks do technically require the submission of these four documents, the first of these four – evidence of the land use right – is the most important one to the lender. It is the land use right that will serve as security for the

on land that is subsequently improved does not create security interest in improvements and that, upon foreclosure, land and improvements may be sold together but mortgagee shall receive none of proceeds attributable to improvements); Danbao fa [Guaranty Law], art. 55 (same); Chengshi fangdichan guanli fa [Law on the Administration of Urban Real Estate] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 51 (P.R.C.) (suggesting that mortgage on undeveloped land use right does not encumber home subsequently built on that land). See also ZHONGZHI GAO, INVEST IN CHINA: A PRACTICAL GUIDE TO REAL ESTATE LAW 147 (2005) ("It is of practical use to distinguish mortgage of land from mortgage of land and buildings on the land.").

49. See *supra* notes 26-31 and accompanying text.

50. See *supra* note 2 (highlighting these contradictions).

51. Interestingly, one experienced real estate developer told me that the obtaining of this certificate in Shanghai requires the developer to demonstrate, among other things, that the building contains defense facilities, such as underground tunnels, to be used in the event of a war. In the alternative, the developer may pay a fee in lieu of providing these facilities.

52. Note that different experts translated the names of these documents into English in slightly different ways.

repayment of the loan. In fact, some years ago, this submission was the only one banks required.

Obtaining these four certificates, which are prerequisites for the receipt of a project loan, requires significant cash outlays from the prospective borrower. One developer estimated that obtaining these four documents consumes roughly 30% of the typical development budget, with most of that expense attributable to the cost of purchasing the land use right. The charge for obtaining a land use right is even higher if it includes demolition and relocation expenses. These costs are passed along to the acquirer of the right by the entity selling the right if the seller must remove structures and occupants from the land, as is often the case in urban developments.⁵³ Since all or a significant part of this money must be laid out before the developer is eligible for a mortgage loan, it appears that current policies limit development to entities that are both well-capitalized and well-connected. Smaller entities probably have tremendous difficulty raising the funds for these initial outlays, and commercial lenders may not be willing or allowed to advance any portion of these amounts.

One expert indicated that project lenders insist that a new building be at least partially constructed before they will lend and accept a mortgage. If this is a common practice, then developers must be in a position not just to acquire the land use right and the other necessary documentation, but also to commence construction with their own funds. They will not be able to borrow any funds until the project is partly completed. The incomplete structure then will serve as security for a loan of the funds needed to continue construction. This requirement increases still further the amount of equity the developer must raise before it is in a position to borrow any construction funds.

Loan-to-value ratios are an additional subject of discussion between developers and their lenders. Developers and lawyers suggested to me that a typical loan-to-value ratio falls in the range of 50% to 80%. This is a term the two parties may negotiate heavily, with more experienced and reliable developers receiving relatively larger loans than their fledgling counterparts.⁵⁴

One small developer bemoaned her complete inability to procure bank loans, because banks will not deal with a company so small. This developer must finance construction entirely via equity, raising funds by selling shares in her company. Even large developers, who are more likely to obtain conventional loans, decry the bureaucratic squabbles they must survive before being able to proceed. One developer noted to me that in a typical project, the developer must obtain 120 government "chops" (official seals), down somewhat from 160 in earlier years. These government requirements are

53. See Stein, *supra* note 10, at 29-35.

54. See also INVESTMENT IN GREATER CHINA, *supra* note 30, at 309 (noting that Shanghai's regulations limit loan-to-value ratios to 80% of face value or net book value or 90% of current cash value, depending on type of property).

applied unevenly, however, and a lack of *guanxi* on the part of the builder may lead to stricter-than-normal application of these rules to its project.

Developers also obtain significant funding from the eventual buyers of the residential or commercial units in their projects. These entrepreneurs are able to pre-sell residential units from promotional brochures and artists' renderings in many of China's white-hot urban areas. Huge buildings often sell out in hours, before the developer has even broken ground. The consumer will sign a purchase contract and put down a deposit, typically in the 20% range. The buyer also must pay part of the remaining purchase price then or soon afterwards, with this second payment often amounting to an additional 20-30%. The developer will establish a payment schedule for delivery of the remaining funds, with the final payment usually due before occupancy. One consultant described buyers as receiving their key when they make the final payment. If the developer breaches, the contract provides for contract remedies, which could turn out to be useless to the buyer if the project has failed. But with the market generally humming, such breaches are not common, and I was told that lenders often support developers who are struggling.

Buyers in this situation must produce some of their acquisition funds when they sign the contract and the rest before the unit is complete. Yet most buyers plan to borrow up to 80% of the money they will need to purchase their unit, which appears to raise a cash-flow problem for most purchasers. If they must pay for the unit before it is complete, they will need to come up with all of the acquisition funds before they have the mortgageable asset their lender is sure to demand. One agent indicated to me that when he bought his own home, the bank was willing to lend him funds to pay for the unit before it was completed, but he was never able to make clear to me what security the lender received while the apartment was under construction. During this fourteen-month period, however, the agent was making scheduled payments on an incomplete apartment at the same time that he was continuing to pay rent on his existing apartment. He acknowledged the risk and expense he incurred but stated that he had no alternative if he wished to become a homeowner. The cost of financing one's home while it is being built appears to be part of the expense of buying a new residence in China.⁵⁵

55. Professors Randolph and Lou state that a purchaser in this situation "can grant a mortgage on the pre-purchased property." RANDOLPH & LOU, *supra* note 15, at 246. This mortgage is recordable. *Id.* at 247. When the unit is completed, the purchaser formally obtains the land use right from the developer and the mortgage is re-registered to encumber the land use right. *Id.* Their statements pre-date the new Property Rights Law by several years. Under the new law, a buyer may apply for "pre-notice registration," which serves as notice of the buyer's interest in the property prior to the official transfer of the land use right. Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 20 (P.R.C.). However, the buyer's rights lapse if the transfer of the land use right is not registered "within three (3) months from the date on which such registration can be registered [sic]." *Id.* Moreover, lenders today will not lend to unit

One expert told me that prospective buyers actually receive two ownership certificates from the developer, one signifying their ownership interest in the underlying land use right and the second covering the unit. He claimed that banks will accept a security interest in the first of these certificates even before the residential unit is completed. The expert who advised me of this practice noted that it is commonplace, but questioned whether it truly is legal or enforceable. I was unable to confirm whether any such ownership certificate covering the land use right has any practical value: will a lender accept a mortgage on this ownership right as security if it may not be able to enforce that mortgage and if the lender is most likely junior in priority to the developer's interest in the land use right and the new structure, both of which may themselves have been mortgaged?

Two different experts told me that both the government and lenders have begun to frown on pre-sales by developers, given the risk to the eventual consumer that the seller will breach its contract and given the manner in which these sales shift costs from the seller to the buyer. Both indicated that developers now are prohibited from selling any units before receiving government approval, which will not be granted until the building is approximately 70% completed.⁵⁶ A bank representative suggested that lenders, too, have begun to discourage pre-sales that take place too early in the construction process, and that banks now may require that developers refrain from selling units to the public until the outer skin of the building has been completed. Obviously, this will be an issue of great importance to a developer that is trying to piece together the financing for a new project.

Contractors serve as another source of funds for developers. It is common practice for construction companies to undertake significant amounts of construction and to pay for the building materials they have used long before the developer pays them for their labor and reimburses them for their cash outlays. Competition for work is sufficiently tight that contractors may not receive their first payment until they have completed roughly one-third of the work. Given that much of the labor for urban construction projects is furnished by migrant laborers who lack permits to serve as urban construction

buyers until a project is 80 percent complete. If developers continue to insist on pre-sale consideration, they will create cash-flow problems for prospective buyers and substantially reduce the pool of eligible buyers.

56. The Law on the Administration of Urban Real Estate provides that new homes may not be pre-sold until "[t]he funds put into the development construction hav[e] reached twenty-five percent or more of the total investment for the construction project, computed on the basis of the commercial houses provided for presale, and the schedule of construction and the date of completion for delivery hav[e] been set," but also states that the developer must obtain a "certificate of permission for the presale of commercial houses" from the local government's administrative department in charge of housing. *Chengshi fangdichan guanli fa* [Law on the Administration of Urban Real Estate] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 44(3)-(4) (P.R.C.).

workers, it seems likely that the contractors are passing these delays along to their workers, slow-paying undocumented peasants who often do not speak the local dialect and who are in no legal position to complain.

If a project fails, the contractor may never receive payment at all. Similarly, late payments from developers to contractors do not always bear interest. It is at least plausible to assume that contractors factor these risks into their bids. Whether or not this is the case, contractors who are paid slowly end up serving as another source of construction financing for the developer.⁵⁷

I was told that, in an attempt to slow the real estate market and protect contractors, the government has recently prohibited the practice of using contractors as reluctant lenders. To the extent that these new rules have been effective, developers must either begin the project with more money of their own or borrow funds from other sources. Developers have found ways to circumvent these limitations, however, and contractors have grudgingly gone along. For example, the developer may sell an interest in the ownership entity to the contractor. Such a sale transforms the contractor from a creditor entitled to payment into a minority co-owner that must contribute labor and materials to the entity in return for its ownership stake.⁵⁸

Interestingly, several different experts informed me that there is no legal mechanism in place in China for a lender to perfect a security interest in rents. Borrowers may pledge the income stream from tenant rentals to their lenders, but lenders have no way to perfect their security interest in this collateral. On new residential and commercial construction that will be sold upon completion, this shortcoming is unlikely to have much relevance, since there are no rent-paying tenants in possession and never will be. Nonetheless, these experts expressed frustration with this gap in Chinese real estate practice. It seems likely that China will have to permit this type of perfection at some future time.

V. LENDING STANDARDS

Although banks do require the submission of certain documents before they will extend credit, such as the income statement noted above,⁵⁹ few of the experts I met expressed much confidence in lenders' internal financial lending requirements. From their perspective, the only preconditions of any significance to lenders are those that are imposed to ensure that the project is

57. By contrast, in a typical American construction loan, the developer pays the contractor on a monthly basis, one month in arrears, and often holds back 5-10% of the amount due as a retainage. The developer borrows the bulk of these funds from its construction lender. Interest on the ever-growing construction loan balance accrues on a monthly basis and compounds.

58. Stein, *supra* note 10, at 20-21.

59. See *supra* note 40 and accompanying text.

legally permissible and socially desirable. Banks appear to make the decision to lend based solely on the legality of the project and the government's wish to see the project proceed and are far less concerned with the financial viability of the completed development. When I asked one American expert who works in China whether Chinese developers gathered data or prepared feasibility studies for proposed new projects, he laughingly replied, "A lot of these buildings were just built." He did concede that this approach has changed recently, with some banks adopting lending standards more familiar to Westerners.

This lack of concern with "the numbers" of a given project may reflect inexperience relative to Western institutions, though one would think that lenders would develop that sort of expertise relatively quickly. More likely, it is a reminder that nearly all banks in China are state-owned or state-controlled, unlike typical Western lenders. The government uses the banking system as an instrument of social policy, subsidizing construction of politically desirable projects even if those projects are not otherwise financially viable.

Many Westerners today view the modern Chinese economy as moving quickly toward capitalism, but one Westerner with significant experience in China's real estate market described China's economy to me as "the farthest thing from a free market you can get without being centrally planned." This odd combination of lenders that are charged with advancing specific government ends and developers that seek to maximize profits and returns while minimizing risks leads to outcomes that differ in important ways from those seen in Western real estate markets.

One expert suggested that developers actually prepare two feasibility studies at the outset of their projects, a bare-bones form for the lender, providing evidence that all legal hurdles have been cleared and that the project is viewed as politically necessary, and a more realistic one for internal consumption only, demonstrating that the development actually will be profitable. A second speaker, who was extremely knowledgeable about China's banking system, advised me that the banks themselves also have two different sets of standards. As a starting point, all banks must comply with guidelines imposed by government agencies charged with bank oversight. In addition, each bank's board of directors sets internal credit policies for that bank, and these internal policies are likely to be more stringent than the bare minimum levels established by banking regulators. One real estate developer argued that banks actually take the decision whether to lend quite seriously, hiring experts to analyze the property, having the land surveyed, and undertaking research as to the strength of the market.

Another real estate specialist, discussing the rapid early development of the Pudong New Area in Shanghai, commented that for publicly desirable projects in that zone, banks were required to lend. In contrast, for projects offering an entirely private benefit, developers had to negotiate with banks individually to obtain loans. Private projects that the government saw as having significant public benefit could always count on receiving a green light

from their state-supported lender.⁶⁰ This approach presumably enhances the municipal bottom line for jurisdictions that are attempting to upgrade and modernize quickly, since ostensibly private projects with significant public benefit will not look as if they were built with any direct outlay of government money. The solvency of the government-controlled bank that has been forced to underwrite a quasi-public improvement that will not produce adequate cash flow is another story.⁶¹

There is a more benign explanation for the fact that real estate loans do not seem to be evaluated on the basis of the economic viability of the project. The short history of the post-Mao real estate market has been one of steadily appreciating real estate values, and most real estate loans have been successfully repaid. Under this explanation, the banks initially adopted a rather short-sighted view of the lending process, and their over-optimism has been repeatedly rewarded ever since. To the extent that banks are accurately assessing projects at all, they may be willing to make risky loans in the belief – supported by all of their recent experience – that the project will appreciate rapidly and the borrower will repay the loan. Several speakers acknowledged that China's banks face serious problems arising from nonperforming loans but argued that most of those loans were made to enterprises engaged in businesses other than real estate. Some obsolete state-owned manufacturing enterprises possess few assets of value that an unpaid lender can pursue. Real estate borrowers, by contrast, have pledged to their lenders an asset that is both valuable and appreciating.

If this explanation is true, developers will be sure to keep paying their loans even if their debts currently exceed the value of their assets, because they have faith that the project soon will increase in value and be “in the black.” This view is bolstered by most of China's recent history, which for the Chinese real estate market is the only history that exists. We can expect China to learn from tough experience at some point in the future, when the inevitable pullback occurs.

Note as well that many of the experts I met focused their discussions on the booming residential markets. Since residential units generally are sold upon completion (if not sooner), the developers recoup their investments quickly, pay off their loans, and move on to the next project. New residential

60. The government also uses its control over the transfer of land use rights as a means of directing specific uses toward (or away from) specific districts. See Peter T.Y. Cheung, *Guangzhou and Tianjin: The Struggle for Development in Two Chinese Cities*, in *CITIES IN CHINA: RECIPES FOR ECONOMIC DEVELOPMENT IN THE REFORM ERA* 18, 46-47 (Jae Ho Chung ed., 1999). Shanghai's government apparently used this power to centralize the foreign banking industry in the Pudong New Area. *Id.* (noting that “foreign banks have to set up their branches or headquarters in Pudong first if they would like to be given the authority to carry out renminbi business in the future”). See also Stein, *supra* note 10, at 25 (making similar point about Pudong's foreign banks and international schools).

61. See *infra* Part VII.

owners have so much on the line – including, often, the residence and life savings of themselves, their parents, and their grandparents – that they will find some way to pay off their acquisition loan. Commercial developments may fare differently. In these settings, the owner may hold the project for a longer time for investment income, and the owner's ability to repay a mortgage loan depends on the receipt of a reliable flow of tenant rents.

One real estate expert provided a more worrisome explanation for the lack of connection between creditworthiness and credit availability. In this speaker's view, the government and its banks help favored candidates invest in real estate. This speaker's implication – not stated outright – is that a successful project will indirectly redound to the benefit of the bank officials who agreed to fund it. Banks lend to favored developers, who surreptitiously reward the decision-makers. While this expert did not directly accuse bank officers of corruption, one real estate professional did tell me, "Law is for the honest people. Like you and me. They restrict people like you and me." The first real estate expert was more optimistic about the future, however, noting that behavior of this type is becoming less common as the market matures and grows more internationalized, as key lenders consider public offerings of their shares, as the government struggles to slow down a very hot real estate market, and as the government and the public become more attuned to the difficulties that institutionalized government graft can cause.

More generally, lending officers at state-owned banks face institutional incentives that do not always lead to the maximization of profits. In Western nations, bank profitability may translate into bonuses for key loan officers while bank losses may send these same officers to the unemployment line. Those who make credit decisions have a direct personal interest in the success or failure of their employers' projects. But Chinese banks are state-owned and must satisfy government policymakers rather than shareholders who demand transparency and profits.

One real estate consultant explained to me that banks assign a lending quota to each of their lending officers and that the officers' bonuses depend solely on meeting these targets. Employees are not rewarded for making good lending decisions or penalized for making poor ones. The pressure simply is to lend, and there is little linkage between the fate of the bank and the fate of those who work for the bank. If loans become troubled as the project progresses, similar incentives come into play. There is no reason for a state-owned bank to concede that an earlier lending decision was a poor one; rather, the bank is likely to lend still more money to keep the project afloat. It is easy to avoid the negative publicity of acknowledging a bad loan when the bank's money supply is essentially unlimited and no one ever gets to see the books.

Opaque procedures that encourage speedy development may have been exactly what China needed in the 1980s and 1990s, as a rapidly evolving government nurtured a new market in real estate. But the government has become concerned that today's markets are dangerously overheated and has taken steps to slow the market as gently as possible. For example, the pre-

vailing rate on home mortgage loans was raised to 6.93% in 2007 in an effort to cool the residential market.⁶² Some banks charge higher rates on loans to purchase second homes, presumably on the theory that the luxury investment market needs to be restrained to a greater extent than does the market in owner-occupied primary residences. Banks also have increased the minimum down payment from 20% to 30%, with some banks charging even more.

For the same reason, the government has imposed several new taxes and raised rates on some existing taxes that affect the real estate market.⁶³ In addition, some units of government have become more inclined to enforce the requirement that the initial holder of a land use right build on the property within two years. Until recently, that standard term had been routinely ignored.⁶⁴ While neither of these recent changes directly affects the relationship between borrower and lender, both are manifestations of the government's desire to keep appreciation of real estate prices in check and both suggest that there will be further tightening in lending standards.

The government also seems worried that ordinary citizens who invest their nest eggs in real estate could suffer dramatic losses if real estate prices drop precipitously.⁶⁵ Chinese law provides for a foreclosure right similar to the one available in the United States,⁶⁶ which means that a real estate recession might cause many new homeowners to lose their recently purchased

62. Interest rates generally have climbed during the past several years, from 4.12% (with government workers entitled to a reduced rate of 3.58%) to 5.27%, then to 5.51%, and then to 6.12%, before settling at the 2007 rate of 6.93%. See Li Xinran, *Fixed-Rate Mortgage Suspended as Interest Rate Raised*, SHANGHAIDAILY.COM, May 22, 2007, http://www.shanghaidaily.com/sp/article/2007/200705/20070522/article_316770.htm. Published sources do not provide consistent confirmation of these rates, and different banks sometimes charge different rates. See, e.g., *Major Banks Confirm New Property Loan Rates*, PEOPLE'S DAILY ONLINE, Mar. 22, 2005, http://english.people.com.cn/200503/22/eng20050322_177819.html.

63. The government, for example, charges a new 1.5% transfer tax. Additional taxes apply to larger apartments, which are defined as those that exceed a baseline of 120 square meters (about 1,270 square feet) by more than 20%. In addition, the government implemented a new 5.5% tax on gains if an owner sells property within one year of purchasing it. These recent changes demonstrate the government's inclination to restrain the market.

64. See *supra* note 23 and accompanying text.

65. The individual right to invest is specifically protected under the new Property Rights Law. Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 65 (P.R.C.) ("The legal savings, investment and returns of individuals shall be protected by law."). Investment performance, of course, is subject to the vagaries of an unsettled and rapidly developing market.

66. *Id.* arts. 195-200; Danbao fa [Guaranty Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995), arts. 53-58 (P.R.C.). See generally Whitman, *supra* note 10, at 65-79 (comparing American and Chinese foreclosure processes).

dwellings. Article 195 of the Property Rights Law, for example, provides that an unpaid lender “may, through agreement with the mortgagor, be paid out of the proceeds from the conversion of the mortgaged property or from the auction or sale of the mortgaged property,” or else the lender may bring suit.⁶⁷ Article 198 states that a foreclosed mortgagor retains the excess of the sale proceeds over the balance of the debt but remains responsible for paying any shortfalls,⁶⁸ and the following section clarifies the rights of junior lenders.⁶⁹ Despite the government’s concerns, one banker informed me that the default rate by homebuyers still is only about 1.5%, a fact that likely reflects the ever-increasing value of residential real estate.⁷⁰ Similarly, a commercial developer indicated that the default rate on commercial property held for rental income is very low.

VI. SOURCES OF FUNDS: LENDERS AND THE GOVERNMENT

The amount of construction in China is shocking and is one of the first things a Western visitor notices. A half-century of pent-up demand is being met in a decade or two by a nation whose citizens want to make China’s presence known to the world. To some extent, this requires large outlays of government funds, particularly for the building of infrastructure. Nonetheless, many new projects are being built and financed privately.⁷¹ This raises a key question: where do the banks in a rapidly developing but still poor nation come up with the funds their borrower clients are demanding? Or, stated more bluntly, where is all this money coming from?

Much of the money seems to come from the savings of China’s 1.4 billion citizens. Along with its huge population, China has a very high savings rate, estimated to be in the range of forty percent; by contrast, the savings rate in the United States is 0.8%.⁷² Until recently, there were few consumer

67. Wuquan fa [Property Rights Law], art. 195.

68. *Id.* art. 198.

69. *Id.* art. 199.

70. In the fourth quarter of 2006, the default rate in the United States increased to 4.95%. Press Release, Mortgage Bankers Association, Delinquencies and Foreclosures Increase in Latest MBA National Delinquency Survey (Mar. 13, 2007), <http://www.mortgagebankers.org/NewsandMedia/PressCenter/50974.htm>. For subprime loans, the rate increased to 13.33%. *Id.*

71. Keep in mind that the term “private” can have a very different meaning in China. Entities that are developing real estate may be state-owned or state-controlled, and the same is true for the lenders that finance their projects. My use of the term “private” covers the range from truly private entities, including those owned at least in part by non-Chinese, to government-influenced entities – both developers and lenders – that are attempting to operate somewhat like private businesses.

72. A recent *China Daily* article estimated that Chinese spend only about 60 percent of their income. Zhang Ran, *Personal Savings Hit Record US\$1.7 Trillion*, CHINA DAILY, Jan. 17, 2006, at 1, available at <http://www.chinadaily.com.cn/english/>

goods on which Chinese citizens could spend their disposable income, and even now many Chinese appear to be saving as much as they can in case the future is not as bright as the present. Chinese parents generally may have only one child, which means that families, and thus child-rearing expenses, are relatively small.⁷³ The lack of a comprehensive social security system combined with the knowledge that a child without siblings may end up supporting two parents and four grandparents has encouraged some fairly frenzied savings. Meanwhile, the average family in China, particularly in urban areas in the eastern part of the nation, is quickly becoming much wealthier. So the amount of private savings potentially available for lending continues to grow.

Families that wish to invest for the future have limited choices about where to place their savings, and bank accounts seem to be one of the few safe alternatives. Banks, however, pay a low interest rate of 0.72% on savings accounts,⁷⁴ which means that Chinese savers will not get rich placing their savings in the bank. The nation's nascent stock markets in Shenzhen and Shanghai have been plagued by volatility, and many people still view the stock market with great apprehension. Overseas investment opportunities are virtually nonexistent in a nation with strict currency controls.⁷⁵ So for the

doc/2006-01/17/content_512872.htm. The personal savings rate in the United States during the third quarter of 2007 was 0.8%. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, NATIONAL ECONOMIC ACCOUNTS, PERSONAL SAVINGS RATE, *available at* <http://www.bea.gov/briefrm/saving.htm> (last updated Aug. 30, 2007). Comparisons of this type can be misleading. Americans are more likely than Chinese to be able to rely on income sources that may not be reflected in the savings rate, including future social security benefits; pre-tax savings accounts such as 401(k) plans and IRAs; capital gains; and home appreciation. *See, e.g.,* Milt Marquis, *What's Behind the Low U.S. Personal Saving Rate?*, FRBSF ECONOMIC LETTER (Federal Reserve Bank of San Francisco), No. 2002-09, Mar. 29, 2002, at 1, *available at* <http://www.frbsf.org/publications/economics/letter/2002/el2002-09.pdf> (noting ways in which measurements of US savings rate are incomplete).

73. Note, however, that some Chinese breadwinners are supporting aging parents as well.

74. Bank of China currently pays 0.72% interest on renminbi demand deposits, with somewhat higher rates available for lump-sum deposits committed for fixed time periods. Bank of China, RMB Deposit Rates, <http://www.bank-of-china.com/en/common/rmbdeposit.jsp?category=1099376639100> (last visited June 7, 2007). One consultant advised me that a typical Chinese bank earns 60% of its income from the spread between the interest rate the bank receives from its borrowers and the much lower interest rate the bank pays to its depositors.

75. *See* Janet Ong, *China May Ease Rules on Investing Overseas*, INT'L HERALD TRIB., Sept. 22, 2004, *available at* <http://www.ihl.com/articles/2004/09/22/bloomberg/sxchina.php> (noting that "China bans its citizens from buying stocks abroad to prevent an exodus of foreign reserves," while also recognizing that China must comply with World Trade Organization rules and must provide its citizens with adequate investment options).

typical Chinese investor, real estate and low-rate interest-bearing savings accounts seem to be the safest options. Many invest in both. As a result, Chinese banks are well-stocked with funds to lend, and Chinese citizens have been competing aggressively to find real estate in which to invest.

In fact, one of the reasons supplied to me most regularly for the success of residential real estate markets in certain Chinese cities is the lack of alternative investment vehicles for the typical citizen. Savings accounts pay minimal interest, the erratic stock exchanges are viewed with intense suspicion, and apartments are appreciating at an enormous, if unsustainable, rate. So every Chinese saver wants to buy an apartment now and sell it within a few months, in the hope that the crash will not occur until the month after that. Many of the people I spoke with, never having experienced a prolonged price drop in a relatively free market, do not appear to believe that a real estate crash will ever occur, or they acknowledge the possibility without seeming to recognize the practical effects it would have on them and on their nation.

One real estate developer claimed that the government simply prints money and supplies it to the banks as needed. Elementary macroeconomic theory suggests that this approach, if followed to any material extent, would lead to inflation. I heard several anecdotal complaints that prices in China have been on the rise, but inflation does not appear to have been a widespread problem in China during the past several years (outside of the residential real estate markets in prime locations!). However, it is difficult to know exactly how much inflation there truly is in a nation where the market remains so heavily controlled by the government.

Even if the government is not increasing the money supply as a means of meeting borrowers' demands or supporting insolvent financial institutions, it may well be using existing government revenues for those purposes. If this is the case – a plausible theory in a nation with numerous state-owned banks that are reportedly insolvent – then the government is simply serving as an indirect lender. Instead of spending its tax receipts and other revenues directly on infrastructure or other development, the Chinese government could be using some of those same revenues to support banks that lend for these same purposes without any realistic prospect of being repaid. Chinese citizens thus may be supporting China's banks indirectly, by paying taxes to a government that dispenses some of these revenues to banks for lending to real estate developers, and directly, by placing significant private savings in those same banks.

Another possible explanation is that China's favorable trade imbalance with Western nations, particularly the United States, provides indirect funding to China's lending institutions. Manufacturing facilities raise huge amounts of cash by selling their wares to American consumers. These manufacturers may be saving some of their money in China's banks, where the funds are available to be lent to real estate developers. And since many of these manufacturers are owned at least in part by the same Chinese state that controls these banks, the government is essentially a huge entrepreneur. This

giant manufacturing company, with hundreds of millions of employees, is diversifying its portfolio by reinvesting its profits from its primary manufacturing business into real estate loans in Shanghai, some of which it knows and expects will never be repaid.⁷⁶

The question of where the banks get their money ultimately is inseparable from the question of where the Chinese government obtains its money, because the banks are government-owned and the government is supporting the nation's real estate boom. Perhaps the best and most complete answer to this key pair of questions was the one supplied to me by a forthright government official. I asked this man the more general question of how the Chinese real estate market has been able to perform so well so rapidly, particularly when compared to corresponding markets in other developing nations. He supplied three cogent answers, with the first of the three being the most notable.

As this gentleman delicately stated, the primary source of financial support for China's government, and thus for its lending institutions, is "our ancestors," by which he meant prior generations of Chinese. The Chinese government currently owns all the land in the nation aside from land owned by agricultural collectives, and the government retains the power to requisition agricultural land whenever it chooses. It nationalized the land it owns over the course of roughly three decades, usually paying the prior owners of the land little or nothing in the way of compensation.⁷⁷ In the early rounds of these condemnations, rural landlords were the principal targets, but by the 1970s, the government was taking the remaining private urban land.

Today, the Chinese government supports its operations in large part by selling off land use rights in this same land, often to the same types of real estate professionals who were the primary targets of uncompensated nationalization during Mao's time. There are currently no ad valorem property taxes in China, so unlike American jurisdictions at the city and county level, China cannot depend on a steady stream of revenues flowing from a stable real property tax base. China relies instead on income taxes,⁷⁸ real property transfer taxes, and, most significantly, proceeds from the sale of long term

76. For a discussion of China's plans for investing its "immense reserves of foreign currency," see Jim Yardley & David Barboza, *China to Open Fund to Invest Currency Reserves*, N.Y. TIMES, Mar. 9, 2007, at C3. See also Keith Bradsher, *Dollars to Spare In China's Trove*, N.Y. TIMES, Mar. 6, 2007, at C1 (addressing China's foreign investments).

77. For the most part, these seizures were uncompensated. But see RANDOLPH & LOU, *supra* note 15, at 9-11 (discussing history of land nationalization since 1949 and noting disagreement among Chinese scholars as to when this process was completed).

78. Collection of income taxes appears to be problematic in an economy so heavily reliant on cash and in which so many people appear to have gray-market income. See *supra* note 40 and accompanying text. I witnessed a large public rally, complete with a uniformed brass band, encouraging citizens to pay their income taxes.

rights to use the same land that the government requisitioned between 1949 and 1982.

Stated more directly, the Chinese government is funding its operations in significant part by selling to private parties land that it previously seized from other private parties. Putting aside the irony that the Chinese government came to power promising to reduce the harmful influence of landlords and now is supporting itself by selling these landlords' former holdings to real estate developers, this method of raising funds creates long-term structural problems for government operations.

To begin with, different levels of government in China have become participants in and beneficiaries of the current real estate boom, and not just referees or superintendents of it. The urban population is growing and China's citizens are demanding higher living standards, so municipal governments must ensure that housing and infrastructure continue to improve in both quality and quantity. Municipal governments such as Shanghai depend on the revenues from the regular sale of land use rights and are in the best position to fund this continued growth and modernization if real estate values keep appreciating. Their participatory role in the real estate market places these government entities in direct conflict with the central government, which wants to maintain social order by ensuring that residential real estate remains affordable and that the gap between the haves and the have-nots does not grow too large.

The central government, in other words, must ensure that Shanghai, Inc., which holds huge tracts of very valuable real estate, does not act in a way that is harmful to the nation as a whole. For example, the central government has established quotas for the amount of land that can be converted from agricultural-collective ownership to government ownership, which is a prerequisite to the sale of land use rights in agricultural land by municipal governments. This national limit both slows real estate development on the outskirts of urban areas and reduces the amount of land that is lost to agricultural use.⁷⁹

79. The central government appears to be concerned about the loss of farmland for two distinct reasons. First, it wants to ensure that China remains capable of feeding itself. See George C.S. Lin & Samuel P.S. Ho, *China's Land Resources and Land Use Change*, in *EMERGING LAND AND HOUSING MARKETS IN CHINA*, *supra* note 9, at 89, 116 (suggesting that China's land resources will not remain adequate for its growing population). Second, it wants to avoid the social upheaval that would be associated with a massive and rapid relocation of tens or hundreds of millions of peasants who migrate to urban areas because they have lost their land, along with the dignity (and retirement security) that farming provides. See PEERENBOOM, *supra* note 7, at 482 (noting prevalence of land disputes).

So, for example, the Land Administration Law states, "Overall plans for land utilization shall be drawn up in accordance with the following principles: (1) strictly protecting the capital farmland and keeping land for agriculture under control lest it should be occupied and used for non-agricultural construction." Tudi guanli fa [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong.,

These municipalities have great incentives to sell the most desirable land first, and to sell off land at a rate that is too rapid to be sustainable over the long term. Downtown property is being cleared of run-down residential and commercial buildings, some of which have not seen any maintenance in more than half a century.⁸⁰ This land commands the highest price in the market for land use rights, suggesting that sales of less central land in future years will generate lower prices on an inflation-adjusted, per-square-meter basis. The government thus will have to sell larger and larger tracts faster and faster if it hopes to continue to feed its habit of operating off the proceeds of sales of land use rights. Governments that maintain their solvency by selling off a finite natural resource tend to mine the most accessible ore first. Their remaining assets are less valuable and may run out altogether.

Land use rights last for forty, fifty, or seventy years, depending on the purpose for which they are conveyed, and the government receives the entire fee for the sale of the land use right at the time of the initial conveyance.⁸¹ It is entirely possible that the government will dispose of the right to use all of the most desirable land well before the first round of land use rights begins to expire. Recall that the current system of transferrable land use rights has

June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998 & Aug. 28, 2004, effective Aug. 28, 2004), art. 19 (P.R.C.). Further, when planning what land is to be used for urban construction, “[a]ttention shall be paid to making full use of the existing land earmarked for construction and using little or no land earmarked for agriculture.” *Id.* art. 22. The new Property Rights Law states, “[t]he State adopts special protection with regard to the agriculture land, strictly limiting the transfer of agriculture land to construction land so as to control the total quantity of the construction land.” Wuquan fa [Property Rights Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 43 (P.R.C.). Expropriation of “basic farmland” requires approval by the State Council. Tudi guanli fa [Land Administration Law], art. 45. See generally *id.* arts. 31-42 (addressing protection of cultivated land).

Note also that those who illegally convert cultivated land to other uses are subject to criminal prosecution. Xing fa [Criminal Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, revised Mar. 14, 1997, Dec. 25, 1999, Aug. 31, 2001, Dec. 29, 2001, Dec. 28, 2002, Feb. 28, 2005 & June 29, 2006, effective June 29, 2006), art. 342 (P.R.C.) (authorizing punishments for violation that include imprisonment, detention, and fines).

80. It is hard to argue that some of these marginally habitable structures merit preservation. But the occupants of these structures receive compensation that reflects the low value of these units. This guarantees that there will continue to be massive residential relocation within major metropolitan areas, as poorer downtown residents use their compensation to purchase newer units in less costly outlying areas, while middle-class Chinese spend their newfound wealth on downtown apartments. See Stein, *supra* note 10, at 31-32. This process guarantees the destruction of many older urban communities, along with their vibrant street life. For an excellent discussion of Chinese condemnation issues, see Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the “Takings” Law in China*, 29 HASTINGS INT’L & COMP. L. REV. 1 (2005).

81. See *supra* notes 22, 27 and accompanying text.

existed only since the late 1980s and that sales of land use rights did not begin in earnest until a few years later, which means that most land use rights still have many years to run. This suggests that the government will have to wean itself of its addiction to these sale proceeds at some point before the first round of land use rights begins to expire.⁸² The problem is not just that the land that is left in ten or twenty years will be less desirable, it is also that there may not be any marketable land left by then at all.

If the government discovers that it has run out of marketable land before a substantial number of land use rights expire, its only alternative will be to locate new funding sources, such as additional taxes, an approach that is likely to be as unpopular in China as it is anywhere else. Even when land use rights do begin to expire in significant numbers, Chinese law is unclear as to whether these rights must be renewed upon expiration of their initial term and whether the holder must pay an additional fee to the government if the holder does have automatic renewal rights.⁸³ So even if China does budget the remaining land judiciously, it will not necessarily be able to raise additional funds by renewing or reconveying land use rights a couple of decades from now.

The Chinese government official who spoke so openly about China's reliance on the sale of land it had previously nationalized offered two additional reasons why China's real estate market has grown so quickly. Bond financing has stimulated Chinese real estate development, although this official indicated that the amount of bond financing is relatively small. In addition, "our own income" has been beneficial, by which he was referring to the frequent use of Build-Operate-Transfer ("BOT") financing.

In a typical BOT deal, a private entity is authorized to build a public project, such as a toll road or a bridge. The private entity is permitted to operate the project for a specified period of time, perhaps twenty years, so that it can recoup its costs and earn a profit through the imposition of user fees, such as tolls. At the end of the stated time period, the project reverts to government control.⁸⁴ In a similar way, private entities that agree to construct

82. This discussion assumes that the holders of land use rights will have to pay to extend them. If the government is required to grant these extensions without charge (an option that, from today's perspective, seems not to be feasible), then the government's problems will be even more dire. See *supra* notes 32-34 and accompanying text.

83. See *supra* notes 32-34 and accompanying text. Presumably, if an existing land use right expires and the right to use the same land then is transferred to a different holder, that new holder would have to pay a new fee for this land use right, reflecting its market value at the time of the renewal.

84. Essentially, this structure differs little from a twenty-year land use right with no renewal option. For an American example, see J.K. Wall, *Public-Private Funding Model for Indiana Toll Road Gains Speed*, INDIANAPOLIS STAR, Nov. 15, 2006 (discussing proposed 75-mile toll road in Indiana to be financed privately and leased to private operator for 75 years).

quasi-public facilities may be awarded desirable land use rights nearby. In effect, they are being paid in kind for their provision of a public facility. One real estate expert stated that these types of projects initially became popular in Hong Kong and have spread from there to the mainland. In Shanghai, the Xintiandi historic preservation project apparently has run at a loss since its inception, but the developer that renovated Xintiandi also received valuable land use rights to neighboring downtown land.

It thus appears that most of the loan financing and other financial support available to real estate developers in China has been borrowed or seized from past, present, and future generations of Chinese. Past generations involuntarily supplied their land to the government, which now is selling it off at an enormous profit. The land is a necessary input for real estate developers, while the sale proceeds are essential to government units struggling to provide vital services to a huge population. Today's Chinese are placing their savings in banks that lend to developers and also are paying taxes that are used directly to furnish new infrastructure and indirectly to support insolvent banks. They also may be paying somewhat higher prices for goods if the government is, in fact, meeting currency shortfalls by simply printing more of it. Future generations of Chinese may pay the rest of the bill if they contribute higher taxes years from now, if they otherwise provide the funds that the government will need to repay its obligations, and if they must renew their expiring land use rights at unexpectedly high prices.

VII. THE STABILITY OF THE CHINESE BANKING SECTOR

Most banks operating in China are owned or controlled by the Chinese government, and these banks' lending decisions are more likely to reflect official government policy than astute business judgment.⁸⁵ This unusual set of motivations causes the Western observer to wonder whether China's banks are financially viable. Since the competition facing the typical Chinese bank is almost entirely domestic, and thus responsive to the same internal political stimuli, China's banks appear to have little to fear from their local competitors. The same non-business factors that cause one bank to make a poor business decision likely cause that bank's rivals to make similarly poor business decisions. Every Chinese bank is wearing the same pair of weighted shoes.

A bank also is a business, however. It collects money from its borrowers, who are paying interest on their loans, and must pay interest to its own depositors from these collections. If China's banks make too many loans that are financially unwise, then at some point they may become insolvent. The government may be able to sustain these banks temporarily with infusions of funds – these banks are, after all, instruments of state policy and can be kept

85. *See supra* Part V.

afloat with general operating revenues from the government.⁸⁶ But if huge, money-losing banks are on China's balance sheet, they could become an enormous drain on China's economy.

As previously noted, China has an astronomical savings rate, and many of China's savers place some of their money in interest-bearing bank accounts.⁸⁷ While the rate banks pay on savings accounts is relatively low, the enormous amount of money currently on deposit in China creates an extremely large interest burden and places great pressure on Chinese banks to lend out their deposits at a higher rate. The larger the proportion of nonperforming loans, the greater the pressure banks feel to ensure that the rest of their portfolios perform adequately.

This business pressure is compounded by the government's continuing insistence on funding projects that it deems worthy. The financial demands of depositors combined with the policy mandates of the government make it imperative that China's banks lend briskly. This probably explains why loan officers must meet lending quotas based on volume rather than on the ultimate success or failure of the projects being funded.⁸⁸ Several different experts confirmed that the modus operandi of Chinese banks seems to be to lend first and worry later. When I asked one lawyer how the system manages to work, he replied, "As long as the economy keeps growing"

Estimates of the proportion of nonperforming loans vary. I frequently heard knowledgeable experts – several affiliated with Chinese banks – state that 30-40% of loans held by Chinese banks are nonperforming. One bank attorney told me that the official estimate is in the 20-23% range. A Western attorney advised me that one of his clients, who purchases nonperforming loans from Chinese financial institutions, believes a more accurate number would fall in the 40-50% range. A Chinese expert summarized the issue more tersely: all banks in China are insolvent. Nearly every expert agreed that the four leading Chinese banks, which control a huge segment of the lending market, are insolvent. Another Chinese banker denied the existence of the problem altogether.

In an effort to address the problem of nonperforming loans, the Chinese government recently established four asset-management companies. The four largest banks in China have been transferring the weakest loans in their portfolios to these asset-management companies, thereby improving the financial stability of the transferor banks. It is widely believed that these transfers were consummated as a precursor to public offerings of the stock of the four banks. These transfers do not solve anything, of course; they simply shift the nonperforming loans to the four new government-controlled entities. To the extent the government must bail out its ailing financial sector, only the form of the problem has changed. Instead of supporting four banks with large

86. See *infra* notes 90-91 and accompanying text.

87. See *supra* notes 72-75 and accompanying text.

88. See *supra* p. 1339.

numbers of nonperforming loans, the government now must support the four asset-management companies instead.

Several experts informed me that the asset-management companies are attempting to sell some of these nonperforming loans to foreign banks at discounts of up to 80%. If this is so, then the overseas buyers are gambling that they will be able to recover at least a percentage of the face value of these debts. The Chinese government, meanwhile, is capping and liquidating its losses on these loans, giving up the slim possibility of recovering all of the loan proceeds down the road and receiving instead a small but certain payoff now. By disposing of these loans at such a steep discount, the government is indirectly subsidizing the banks' earlier poor lending decisions, many of which were made under government pressure to fund projects the government deemed meritorious.

One way or another, the government – though not necessarily the same arm of the government – is footing part of the bill for unwise decisions made by Chinese lenders in the past. The net expense differs little from the price the government might have paid had it funded some of these projects directly or even built them itself.⁸⁹ When a bank suffers a loss in China, that state-owned entity is indirectly passing these costs along to the entire population. The ultimate sources of these funds are the same as those noted earlier, and include income tax revenues, transfer tax revenues, sales of land use rights, bond financing, and user fees and tolls. It therefore is critically important to China that the current real estate boom, which serves as the wellspring for many of these revenue streams, continues.

Several real estate experts, while acknowledging the problems facing China's banking sector, argued that the banks' problems do not arise from real estate loans. Real estate developers nearly always pay their loans. Most of their projects, particularly residential developments, are sold upon completion, so the developers retire their debts quickly and move on to the next project. The buyers, meanwhile, generally are owner-occupants or investors, and they are able either to make their mortgage payments or to flip the properties quickly and at a profit. These experts claim that as long as real estate prices continue to increase, the rate of nonperforming real estate loans is likely to remain small.

All of these experts seemed dismissive of the idea that real estate prices might ever drop precipitously, a phenomenon unknown in the modern iteration of the Chinese real estate market. If such an event were to occur,

89. Note that one governmental entity may be profiting at the expense of another. For example, a municipal government may have benefited from the construction of a factory that, while unsuccessful overall, employs numerous local residents and reduces the local government's burden of supporting them. If the lender that holds a loan to that company that has become non-performing opts to sell this loan to an asset-management company rather than seeking to enforce it, the state-supported lender and the state-supported asset-management company share the ultimate loss, while the municipal government entity continues to enjoy the benefit.

China's lenders might suffer even more than they already have, because of their earlier failures to make credit decisions based on a mortgagor's actual capacity to repay. Such a development, however painful in the short term, might eventually lead to the growth of a more mature residential lending industry, with loan decisions based on an applicant's actual salary, job history, and credit record.

The true sources of the banks' bad loans, according to these experts, are state-owned enterprises, foreign joint ventures, and wholly foreign-owned enterprises.⁹⁰ While the gargantuan non-real-estate problems facing China's banking system are well beyond the scope of this Article, it is worth noting that the Chinese government has significant reasons to ensure that many of these loans continue to be repaid, even if it means using general tax revenues for the repayments. Some of the companies that might otherwise collapse are high-profile Chinese brand names, and it could shatter confidence in the emerging Chinese market, both at home and abroad, if the government were to allow a well-known company to fail. China has at least as much interest in ensuring the survival of some of its banner companies as the United States had in bailing out Chrysler or United Airlines.

More critically, some of China's state-owned companies provide thousands of their workers with housing, education, health care, a reliable retirement income, and all the other benefits that used to be known as the "iron rice bowl." If too many of these companies were to close their doors, "chaos in the countryside" might threaten the viability of China's government and the supremacy of the Chinese Communist Party.⁹¹ China's government probably is more concerned about avoiding problems that could lead to its own downfall than it is about any of the other issues it faces today.

Some of the nonperforming loans in sectors other than real estate are relatively recent in origin, and certainly were made after the international community began to focus on the fragility of the Chinese financial sector. To some extent, this likely reflects the continued importance of personal connections in obtaining loans, particularly those loans that might not be forthcoming based solely on the underlying quality of a project. Even without the persistence of the *guanxi* problem, however, it is clear that the government wants the banks it controls to keep antiquated factories afloat even if the resulting loans worsen the health of the banks themselves.

By rescuing companies that cannot pay their debts, China is indirectly supporting more than just its banking industry: it truly is keeping its entire social welfare system afloat. China's leaders seem to recognize this fact

90. One expert argued that nonperforming automobile loans account for a growing part of this problem as well. *See supra* note 40.

91. A Western lawyer informed me that some of these outdated factories are diversifying by investing in real estate, trying to offset losses from their outdated but essential manufacturing operations with investments in the hottest sector of the twenty-first century. *See also supra* note 76.

clearly, and the real question is what might happen if China's economy slows down to the point that the government simply is unable to keep these enterprises alive any longer. One real estate developer's answer to my question of whether China's banks are stable – "They must be!" – succinctly captures the combination of hope and faith that so many Chinese appear to feel.

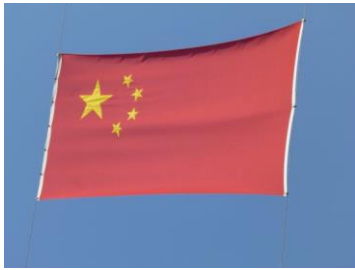
VIII. CONCLUSION

China's real estate sector still is in an early stage of development, but it nonetheless is more mature than China's real estate law. Despite its youth, and despite the fact that it developed in the absence of a formal real estate code, the Chinese real estate industry has fared remarkably well since market concepts were re-introduced in the 1980s.

This Article has examined some of the most important features of China's young real estate system. By examining the types of loans and lenders that are present in China and the types of assets that a borrower can mortgage as security, it has drawn parallels with the American system while highlighting notable differences. By discussing lending standards, the ultimate source of loan funds, and the fragility of the Chinese banking industry, it has noted some critical policy questions that investors must consider in the future.

To many Western observers, it would appear that the Chinese real estate market should have collapsed years ago. Yet this market seems to be thriving, and the level of confidence within China in the stability of real estate as an investment is extremely high. Western observers and participants are sure to follow China's real estate markets with great interest in the coming years, as the Chinese economy continues to grow and become more integrated with the economies of other nations.⁹² An improved understanding of China's legal and business systems will benefit real estate market observers and participants within China and elsewhere.

92. "China's construction industry is a mainstay of the Chinese economy and is projected to become the largest construction market in the world by 2010." Ashley Howlett, *PRC CONSTRUCTION LAW – A GUIDE FOR FOREIGN COMPANIES* 3 (2006).



Intellectual property law and competition law in China – Analysis of the current framework and comparison with the EU approach

by Yeung Nga Man

Introduction

There is a famous Chinese saying, according to which competition results in improvement¹.

Indeed, it is Chinese tradition to encourage competition in order to enhance innovation and improvement, especially using their intellectual property rights (“IPRs”) as drivers. However, there have been numerous reports on IPRs infringements by Chinese companies, leading to doubts on China’s ability to protect IPRs. Therefore, it is of primary importance to determine whether the new Anti-monopoly Law (“AML”) enacted in 2008² and the State Administration of Industry and Commerce (“SAIC”) Draft Guide on Anti-monopoly Law enforcement in the field of intellectual property rights 2012³ (“Guide”) will help protect IPRs or rather deepen the problems. It is argued that the regime has worked successfully to provide better IPRs protection along with other intellectual property (“IP”) law regimes. However, it is also argued that there is room for improvement. Firstly, AML is inadequate in addressing the problems. Secondly, it lacks clarity in relation to Article 55 AML, thirdly, transparency in the relationship between AML and other applicable competition and IP laws, and fourthly, with the Agreement on Trade Related Aspects of IPRs⁴ (“TRIPS”). Fifthly, the Guide does not accord with the reality. Sixthly, the enforcement bodies lack guidance and experience in adjudication, and lastly, a clear division of labour in enforcement. Furthermore, China should continue to learn from various other international approaches well-established in the European Union and the United States⁵.

Part I of the essay will examine the present IPRs protection in China. In Part II, contrary to the myth that competition and IP law conflict with one another, it will be argued that both foster innovation and development, and enhance consumer welfare. The competition law regime in China will be discussed in Part III, with a specific focus on AML. The enforcement of the regime will be evaluated. Next, the E.U. approach will be discussed in Part IV, which China can consider adopting: the Block Exemptions approach from the E.U. on horizontal agreements, which will be discussed in Part V.

It should be noted that despite of the fact that competition and IP law are related to many other aspects, at the very outset alternative methods of protecting IPRs and other Chinese competition-

¹ In Chinese: “有競爭 才有進步”

² Anti-monopoly Law 2008

³ SAIC Draft Guide on Anti-monopoly Law enforcement in the field of intellectual property rights 2012

⁴ Agreement on Trade Related Aspects of Intellectual Property Rights 1994

⁵ The author would like to thank Professor Valentine Korah and Professor Ioannis Lianos, Faculty of Laws, University College London and Professor Thomas Cheng, Faculty of Laws, University of Hong Kong for reviewing and offering unfailing guidance to the essay précis.

related legislation will not be discussed. Furthermore, the essay will not engage in an economic nor trade-related approach in analysing the relationship between competition and IP law.

I. PRESENT IPRs PROTECTION IN CHINA

To Part A contains an overview of the present IPRs protection in China. IPRs infringement affects the Chinese and the world economy as a whole, which is the subject of discussion in Part B.

A. Overview

IP law in China is of a high quality by global standards⁶. Both Chinese and foreign firms are granted same amount of cost and time in applying IPRs under Chinese law, comparable with the rest of the world⁷. The present IPRs protection in China has improved significantly compared with that a decade ago. As China increasingly interacts on a global level and is part of the World Trade Organisation (“WTO”), its laws have been constantly evolved to provide IPRs protection and attract further investment. IPRs protection was featured in the Twelfth Five Year Plan (2011-2015)⁸ with the pharmaceutical sector being one of the strategic industries that call for special attention.

However, China is still infamous for counterfeits and piracy, and was even labelled as the “theft of American IP”, with branded goods, digital products, movies and music⁹, surpassing over US\$1 billion¹⁰. Chinese firms have a strong ability to mirror foreign technology. Many foreigners are also concerned with legal and political non-transparency (to be discussed in Part III), and restricted market access, caused by preferential treatment to Chinese companies in tax and finance¹¹. Such local protectionism is likely due to official and public concern about potential foreign dominance over Chinese businesses and a strong desire to build up the latter¹², which can be seen from the Chinese foreign investment policies of favouring foreign technology transfer to Chinese companies¹³. As a result, it is less common that the foreign party can defend successfully against IPRs infringement by a Chinese party, and rarely the opposite is true: in the *Tsum-Sony*¹⁴ case, Sony as the foreign party

⁶ Ian Harvey (2011) *Intellectual property: China in the global economy – myth and reality* https://workspace.imperial.ac.uk/business-school/Public/research/I_Egroup/IPRC/IP_in_china_ian_harvey.pdf (17th July 2013)

⁷ *ibid*

⁸ The Twelfth Five Year Plan (2011 – 2015), 11 March 2011

⁹ U.S. International Trade Commission *China: effects of intellectual property infringement and indigenous innovation policies on the U.S. economy* U.S. International Trade Commission 2011, 3-8

¹⁰ Xiantao Huang *Patent: Strategy, management and litigation* China, Beijing Shi 2008, 3

¹¹ Reuters “EU business sees partial reversal of China reforms” *Reuters* New York 2nd September 2009 (online version)

¹² Alan Fels *China’s Antimonopoly Law 2008: An Overview* (2012) 41 *Rev Ind Organ* 7-30, 9

¹³ *ibid*

¹⁴ *Tsum (Shanghai) Technology Co Ltd v. Sony Corporation* (2004) Shanghai No. 1 Intermediate People’s Court

won. Lastly, the problem with abusive IP litigation is serious, with over 90% of all such cases between Chinese IPRs holders¹⁵. Thus, there is a strong and urgent call for better IPRs protection¹⁶ in China.

B. IPRs infringement impact

To IPRs infringement has a huge impact on the economy in China and the world. Chinese companies' innovations are stifled¹⁷ because of piracy. Many foreign investors will lose confidence in dealing with Chinese companies. The gains of a lower cost of production do not outweigh the losses, and most importantly, China has the unwanted label as a piracy country. Foreign firms such as some IP-intensive firms suffered losses of up to US\$48 billion in 2009 and had spent approximately US\$4.8 billion to address the infringement problem¹⁸. These are in respect of reducing profits, increasing legal costs of taking legal action and defending against IPRs infringement, damaged brand name and product reputation¹⁹. Like in China, their innovation is stifled and competition is reduced. Consumers will have less choice and consumer welfare is hindered. Therefore, there is every reason to better enhance IPRs protection, such as through competition law.

II. COMPETITION AND IP LAW – IN CONFLICT OR COMPLEMENTARY?

To many, competition and IP law appear to conflict with each other. In fact, they can be complementary and share similar policy goals e.g. encouraging innovation and development, and enhancing consumer welfare²⁰. It is argued that competition law can help enhance IP protection.

There are controversies about the conflicts between competition and IP law. On one hand, IP law grants IPR owners the exclusive right of exploit their IPRs. This entitles them to exclude others from copying or commercialising an invention that falls within the scope of their IPRs²¹. They can charge reasonable monopoly rates when others use or buy their IPRs and licenses to achieve exclusivity, and territorial and price restraints²². These rights are justified as IPR holders should, as a matter of public policy be entitled to recoup the substantial amount of time and effort invested in researching and developing their products and services²³. On the other hand, unreasonable monopoly

¹⁵ H. Stephen Harris Jr., Peter J. Wang, Yizhe Zhang, Mark A. Cohen and Sebastien J. Evrard *Anti-monopoly law and practice in China* New York, Oxford University 2011, 250

¹⁶ Albert Guangzhou Hu Propensity to patent, competition and China's foreign patenting surge (2010) 39(7) *Research Policy* 985-993

¹⁷ Jayanthi Iyengar "Intellectual property piracy rocks China boat" *Asia Times China* 16th September 2004 (online version)

¹⁸ The statistics are from a survey in above 8, interviewing over 5,000 U.S. firms, conducted by an independent fact-finding federal agency.

¹⁹ *ibid*

²⁰ Valentine Korah The interface between intellectual property rights and competition in developed countries (2005) 2:4 *SCRIPTed* 429

²¹ Angie Ng, Ding Liang and Peter Waters (2008) *The intersect between intellectual property law and competition law – implications for China* <http://www.kingandwood.com/article.aspx?id=IPBulletin081127-01> (17th July 2013)

²² *ibid*

²³ James F. Rill and Mark C. Schechter International anti-trust and intellectual property harmonization of the interface (2003) 34 *Law and Policy International Business* 783, 783

rates may trigger competition law sanctions. Indeed, competition law is concerned with curtailing market power exercised by firms (especially the dominant ones) which may prove harmful to consumer welfare²⁴. With an enhanced level of competition, consumers benefit from lower prices and wider choices. Competition law is against monopoly, which IP law may create. This is especially true for cumulative innovation²⁵ when existing IPRs are supposed to encourage, not to hinder follow-on innovation.

In fact, most conflicts between competition and IP laws stem from the uncertainties on, for instance, the extent of which competition policy on IPRs is about short-run efficiency aims, whether market power should be inferred from the existence of IPRs, and striking the balance on anti-competitive restriction in the exercise of IPRs²⁶.

Both competition and IP law share the same policy goals of encouraging innovation and development, and enhancing consumer welfare²⁷. Both competition and IP law aim to protect IPRs in order to facilitate innovation and encourage investment in researching and developing more new ideas. IP law, in particular, facilitates the commercialisation of innovation and encourages public disclosure when the IPR owner registers its IPR. Both spur competition among rivals to be the first to enter the marketplace²⁸. Efficient production (static efficiency) and more innovative activity (dynamic efficiency) can be achieved with better consumer welfare.

One author once stated that IP law is a carrot, whereas competition law is a stick²⁹. Competition law recognises that an effective legal regime of IPRs is essential to a competitive economy, while IP law recognises the value of competition by limiting the life and breadth of IPRs³⁰. In the *Magill* case³¹, it was held that the mere ownership of an IPR cannot automatically confer monopoly. IPRs may indeed confer a legal monopoly, depending on the existence of substitutes in the market³², but not necessarily an economic monopoly in competition law on the exercise of IPRs³³.

²⁴ *SCM Corp v. Xerox Corp.* 645 F.2d 1195, 1203 (2d Cir. 1981)

²⁵ Ioannis Lianos and Rochelle C. Dreyfuss *New challenges in the interaction of intellectual property rights with competition law – a view from Europe and the United States* Centre for Law, Economics and Society, Faculty of Law, University College London April 2013

²⁶ Organisation for Economic Co-operation and Development (“OECD”) *Competition policy and intellectual property rights* OECD 1997

²⁷ Michael A. Carrier *Innovations for the 21st century: harnessing the power of intellectual property and antitrust* Law United Kingdom, Oxford University Press 2009

²⁸ DOJ and FTC *Antitrust enforcement and intellectual property rights: promoting innovation and competition* DOJ and FTC U.S. 2007, 2

²⁹ Ariel Ezrachi *International research handbook on international competition law* United Kingdom, Edward Elgar 2012, 464

³⁰ Ioannis Lianos *A Regulatory theory of IP: Implications for competition law* Centre for Law, Economics and Society, Faculty of Law, University College London, November 2008

³¹ *Radio Telefis Eireann and Independent Television Publications Ltd v. Commission* (1989) C241-91

³² Competition Commission of Singapore *Competition Commission of Singapore Guidelines on the treatment of intellectual property rights* Competition Commission of Singapore 2007, 4

³³ Gustavo Ghidini *Intellectual property and competition Law: the innovation nexus* Edward Elgar United Kingdom 2006, 109

It is overly optimistic to expect that IP law can independently regulate the exercise of IPRs so comprehensively to meet competition objectives³⁴. Nor should there be an over reliance on the competition law regime for the best IPRs protection. A proper balance should be maintained between the two. The analysis is particularly relevant to China as it is developing rapidly technologically³⁵.

III. COMPETITION LAW REGIME IN CHINA

The competition law regime in China is relatively new. The focus of this paper will be on the AML which came into effect in 2008. AML is one of three statutes that protect competition in the Chinese markets³⁶. Some scholars describe it as an economic constitution³⁷. The AML aims to prevent and restrain monopolistic conduct, promote fair competition, enhance economic efficiency, safeguard consumer and social public interests³⁸ and promote a healthy development of the socialist economy with Chinese characteristics³⁹, thus protecting small and medium enterprises from larger competitors, in particular, foreign rivals⁴⁰. The approach of the AML accords with other international approaches and reflects global concerns⁴¹.

The legislative background of the AML is discussed in Part A. The AML and the evaluation of its enforcement are discussed in Parts B, C and D respectively. The position will be summarised in Part E.

A. History

As a result of China's reform and opening-up policies in the late 1970s, China's efforts in promoting fair competition and cracking down on monopoly activities have been successful⁴². There are numerous provisions that regulate monopolistic conduct and restraints on competition, dispersed in various laws, regulations and administrative rules⁴³. The earliest law on competition is the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy 1980, commonly referred to as the Ten Articles on Competition, which aims to combat monopolies⁴⁴. The Chinese law continued to develop and there are currently three pieces of legislation related to competition. The

³⁴ Steven Anderman *EC Competition law and intellectual property rights: the regulation of innovation* Oxford Clanderon Press 1998, 17

³⁵ Thomas Cheng "The Patent-Competition Interface in Asia: a regional approach" in above 39

³⁶ The other two are the Anti-Unfair Competition Law 1993 ("AUCL") and the Price Law 1998.

³⁷ Paul Jones Licensing in China: the New Anti-monopoly Law, the abuse of IP rights and trade tensions (2008) XLIII(2) *les Nouvelles: J. Licensing* 106

³⁸ Article 1 AML

³⁹ The Constitution of the People's Republic of China 1993

⁴⁰ Nathan Bush *The PRC Antimonopoly Law: unanswered questions and challenges ahead* The Antitrust Law Group, American Bar Association U.S. 2007

⁴¹ Daniel Sarvin (2008) *China's Anti-monopoly will have a broad impact beyond notification* http://www.martindale.com/business-law/article_Bingham-McCutchen-LLP_493958.htm (17th July 2013)

⁴² Nie Peng "China's first Anti-monopoly Law takes effect" *Xinhua News Agency* 2nd August 2008 (online version)

⁴³ Consumer Protection Law 1993 and Bidding Law 1999

⁴⁴ Promotion and Protection of Competition in the Socialist Economy 1980

first one is the AUCL, which prohibits 11 types of illegal conduct, including monopolistic conduct, such as abuse of dominant market position by public enterprises, predatory pricing, designated transactions by public utilities, tying, bid rigging and administrative monopoly, which is unique and common in China⁴⁵. Secondly, the Price Law 1998, which is the price control law on cartels, predatory pricing and price discrimination⁴⁶, and thirdly, the AML 2008. The enactment of the AML was put on the legislative agenda in 2004, passed in 2007 after 13 years of continuous development and three revisions, and implemented in 2008.

Many Chinese lawmakers hoped that the AML would provide a solution to pressing competition problems, though not necessarily directed at IPRs⁴⁷ but on mergers and acquisitions. Such issue was raised in a hostile takeover and IPR dispute case between a domestic Chinese beverage manufacturer Wahaha and the French food company Danone⁴⁸. Wahaha was the target of a takeover bid by Danone, which simultaneously charged Wahaha for inappropriate use of its trademark. The chairman of Wahaha, Zong Qinghou, a member of the legislative body, the National People's Congress ("NPC"), and another member, Li Guo-guang, in the NPC, also from the Legal Committee and the Vice President of the Supreme People's Court ("SPC"), called for a proposal to restrict foreign investment from monopolising various industries in China through mergers and acquisitions⁴⁹. Therefore, the AML was implemented with the hope to protecting fair competition in China in general.

B. AML

To Among the eight chapters and 57 articles in the AML, it prohibits four types of activities: monopolistic agreements, abuse of dominance⁵⁰, concentration of undertakings⁵¹ and abuse of administrative power to eliminate or restrain competition⁵². Monopolistic conduct both within the territory and those outside are subject to AML scrutiny⁵³. Only actions conducted by agricultural producers and rural economic organisations are excluded from the operation of the AML⁵⁴. The main articles which will be discussed below are Articles 13, 14, 17 and 55⁵⁵.

⁴⁵ Pate R. Hewitt What I heard in the great hall of people – realistic expectations of Chinese antitrust (2008-2009) 75 *Antitrust L. J.* 195

⁴⁶ Shang Ming Antitrust in China – a constantly evolving subject (February 2009) *Competition Law International* 4 – 11, 4

⁴⁷ Thomas R. Howell, Alan Wm. Wolff, Rachel Howe and Diana Oh China's new Anti-monopoly Law: a perspective from the United States (2009) 18(1) *Pacific Rim L. Poly J* 53, 62

⁴⁸ Lan Xinzhen "Wahaha vs. Danone" *Beijing Review China* 7th June 2007 (online version)

⁴⁹ Zong Qinghou "Proposal on legislation restricting foreign investment from monopolizing various industries in China through mergers and acquisitions and maintaining economic security" *Xinhua Net China* 14th March 2007 (online version)

⁵⁰ Article 3 AML

⁵¹ Article 19 AML

⁵² Article 32 AML

⁵³ Article 2 AML

⁵⁴ Article 56 AML

⁵⁵ Abuse of administrative power will not be discussed.

Articles 13 and 14 are about anti-competitive monopoly agreements. Article 13 prohibits horizontal agreements that fix the prices, limit the output or sales, divide the sale market or raw material procurement market, limit the purchase of new technologies or new facilities or limit the development of new products or new technologies, engage in boycott transactions and other prohibitions⁵⁶. The Judicial Interpretation on Adjudication of Technology Contracts in 2005 declares that restrictions on the acquisition of competing technology or development can be considered as "illegal monopoly of technology"⁵⁷. Similarly, Article 14 prohibits vertical agreements that fix the prices for resale, restrict minimum price for resale and other prohibitions⁵⁸. There are exemptions in Article 15 for the application of Articles 13 and 14, such as if the agreements enables the consumer to share the benefits derived from the agreement and will not severely restrict competition, and either improve technology or research and develop new products, upgrade product quality, reduce cost, improve efficiency, unify product specifications and standards, carry out professional labour division, improve operational efficiency and enhance competitiveness of small and medium sized entities, serve the public welfare, such as conserving energy, protecting the environment and providing disaster relief, mitigate serious sale decreases or excessive production during economic recessions, safeguard justifiable trade interests and economic cooperation, or other circumstances stipulated by law and the State Council⁵⁹.

Article 17 is about abuse of market dominance⁶⁰. It prohibits those with dominant market position from without justifiable cause engaging in predatory pricing, refusing to trade, allowing exclusive dealing or tying. Article 18 further explains that there are a number of factors to determine the finding of a dominant market position for a business operator⁶¹, such as its market share, its capacity to control the markets, its financial and technical conditions, the degree of dependence of other business operators and the degree of difficulty to enter the market⁶². Article 19 then stipulates the dominant market share threshold required⁶³: 50% for one business operator, two of them: 66.7% and three of them: 75%.

Article 55, which is under the chapter on Supplementary Provisions, is particularly related to IPRs. It states that:

*"This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators" conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law."*⁶⁴ (Emphasis added)

⁵⁶ Article 13 AML

⁵⁷ Judicial Interpretation on Adjudication of Technology Contracts 2005

⁵⁸ Article 14 AML

⁵⁹ Article 15 AML

⁶⁰ Article 17 AML

⁶¹ In this context, the phrases "business operators" and "IPR owners" will be used interchangeably as they refer to the same type of people in the AML.

⁶² Article 18 AML

⁶³ Above 61

⁶⁴ Article 55 AML

The first half of Article 55 sets out an exemption from the application of the AML, which IPR owners are not subject to such scrutiny for merely exercising their IPRs consistent with the laws and relevant administrative regulations on IPRs. The exemption is however, conditional⁶⁵. The second half sets out the condition: if they engage in any conduct that seeks to eliminate or restrict market competition by abusing their IPRs, then, the AML shall apply. The plaintiff or the complainant bears the burden of proof to determine whether the alleged conduct violates specific provisions of the AML. When the defendant has recourse to the first half of Article 55 as a defense, the complainant must then prove the defense is not available by relying on the second half, that the conduct constitutes an IP abuse with anti-competitive effects⁶⁶. A balancing analysis will be taken to see if pro-competitive effects are created by restraining the exercise of IPRs and whether such outweigh the anti-competitive effects caused by the defendant's activities before the defense is effective.

There are mainly two enforcement bodies to the AML and other competition laws: the Anti-monopoly Commission ("AMC"), and three Anti-monopoly Enforcement Agencies ("AMEAs")⁶⁷. Firstly, the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission ("NDRC") enforces against prohibition on abuse of administrative power in price-related matters. Secondly, the Anti-monopoly and Unfair Competition Enforcement Bureau of SAIC enforces against the same but on non-price related matters. Lastly, the Antimonopoly Bureau of the Ministry of Commerce ("MOFCOM") administers and conducts merger reviews. These agencies are also respectively responsible for determining whether IPRs should be granted in the first place. On the judicial aspect, the IP tribunal of the Intermediate People's Courts hears civil cases relating to competition, with the same jurisdiction by the SPC, regardless of whether these disputes are IP related or not⁶⁸.

There are also leniency programs that play an important role in investigating and sanctioning monopoly agreements⁶⁹. Whistle-blowers can report to the AMEAs but often this would have stirred suspicion among business partners. This is special and unique in the AML regime compared with other international approaches.

C. Enforcement

The enforcement of the AML by the AMC and the AMEAs has been a success. More officials were employed to intensify the enforcement efforts. Until 2012, the NDRC had investigated 49 price-monopoly cases, few involving abuse of dominance, and 20 of them were closed with administrative penalties⁷⁰. The SAIC had investigated 17 cases: 16 on cartels⁷¹ and 1 on abuse of dominance with administrative penalties in 6 cases. The MOFCOM had accepted 186 notifications of concentration

⁶⁵ *ibid*

⁶⁶ Susan Ning (2009) *Antitrust litigation in China* <http://www.kingandwood.com/article.aspx?id=antitrust-litigation-in-china-03-china-bulletin-2009&language=en> (17th July 2013)

⁶⁷ *ibid*

⁶⁸ SPC Provisions on the Cause of Action of Civil Cases 2011

⁶⁹ Above 46, 7

⁷⁰ Susan Ning, Hazel Yin and Yunlong Zhang (2013) *The Anti-monopoly Law of China: what we have seen in 2012?* <http://www.chinalawinsight.com/2013/02/articles/corporate/antitrust-competition/the-anti-monopoly-law-of-china-what-we-have-seen-in-2012/> (17th July 2013)

⁷¹ Cases involve big foreign companies such as Samsung, LG, etc.

cases⁷², approved 142 of them and 16 with conditions. The SPC had then selected 34 typical competition and IP cases from 2012⁷³, and summarised them with issues on the application of the laws that can have universal significance. It had also issued a judicial interpretation relating to the court procedures to be followed in the AML in 2009⁷⁴.

A Draft Guide on competition enforcement involving IPRs⁷⁵ was published after four years of collaborative effort of the AMEAs, the State Intellectual Property Office (“SIPO”), comments from the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) in the U.S.⁷⁶. There were also voluntary submissions from foreign and domestic firms, trade associations, private practitioners and scholars⁷⁷. The Guide is not binding but has been successfully used as guidance.

Just like other international approaches and the discussion in Part II, business operators with IPRs will not be automatically deemed to be enjoying dominant market power, under the safe harbour mechanism in Article 19 AML⁷⁸. When analysing monopoly behaviours, the SAIC for instance, will define the relevant market and determine the market position, analyse the nature and manifestation of the exercise of the IPR on competition and the relationship between the operators in the market⁷⁹. The restriction on competition caused by the monopolistic conduct must exceed that of a normal exercise of IPRs before the SAIC takes action⁸⁰. Also, the AMEAs will not investigate a unilateral, unconditional or non-discriminative refusal to license, but those that are obviously unfair and discriminative, without justification or as a means of enforcing other restrictive terms or tying arrangements⁸¹.

The AMEAs have specific enforcement focuses. Abuses of IPRs were specifically mentioned in the National Patent Development Strategy as an area that calls for attention⁸². The SAIC for instance, focuses on monopoly conducts of public utility enterprises, such as electricity, water and gas suppliers, typical antitrust cases that cause serious impact on market competition, industrial monopolies and regional blockades⁸³.

⁷² One of the cases is the Huiyuan Juice acquisition by Coca-Cola, rejected by MOFCOM in 2009.

⁷³ SPC *SPC Annual report of intellectual property cases* SPC 2012

⁷⁴ SPC Action Plan for Intellectual Property Protection 2009

⁷⁵ The Guide

⁷⁶ Susan Ning and Hazel Yin (2012) *China's Anti-Monopoly Law: retrospect and prospect on the fourth anniversary* <http://www.kingandwood.com/Bulletin/ChinaBulletinContent.aspx?id=6a3d8f71-d16d-4c1d-b3d0-b251d881e617> (17th July 2013)

⁷⁷ Richean Li The Chinese State Administration of Industry and Commerce makes another attempt to define anticompetitive exercise of intellectual property rights (August 2012) *Competition Law Centre*

⁷⁸ Above 51

⁷⁹ Above 77

⁸⁰ *Dexian v. Sony* (2004) Shanghai No. 1 Intermediate People's Court

⁸¹ Article 17, the Guide

⁸² National Patent Development Strategy 2000, Chapter IV (1)

⁸³ Susan Ning, Sun Yiming and Kate Peng (2012) *Chinese antitrust regulators vow to increase transparency* <http://www.mondaq.com/x/193012/Cartels+Monopolies/Chinese+Antitrust+Regulators+Vow+to+Increase+Transparency> (17th July 2013)

On standard setting and development, there are no standard settings in China. Such standards are set by the State on a compulsory or voluntary basis, outside the AML framework⁸⁴. There are concerns that standard settings or technology pools can create negative effects on competition, when they prohibit licensors from granting licenses outside of joint business operation, insert no-challenge and non-competition clauses in the agreement, charge exhaustive rates and demand grant-backs⁸⁵, with no justifiable reason. Neither are there published guidelines by the AMEAs for the operation of standard-setting bodies ("SSOs"), patent pools or licensing, providing IPR holders with assurance that their standard setting activities would definitely not be subject to the AML⁸⁶. However, the Guide clarifies that the acts of managing the joint business operation will not be automatically reviewed⁸⁷, except when the acts constitute discrimination against other participants, restricting them from using the patents⁸⁸. If the IPR holder participates in the standard setting and development but fails to disclose the IPR during the development process and its conduct has been monopolistic, its IPR claims will not be enforced⁸⁹. An AMEA may impose a license on a reasonable and non-discriminatory basis as sanction. Scrutiny will increase further if the market position of the operator is more dominant and they unreasonably restrict the establishment of substitute operations⁹⁰. Moreover, the Guide also suggests prohibiting agreements that fix patent royalties between competing business operators⁹¹. But it fails to understand that it has been the practice in China for operators to determine royalties among themselves. It remains to be seen how the law around SSOs will develop, as the AMEAs are very unlikely to intrude into the State's domain.

On the issue of the enforcement powers of the AMEAs and the courts, apart from administrative penalties, the Measures for Compulsory Patent Licensing issued by the SIPO in 2011 states that neither the AMEAs nor the courts will have the power to grant compulsory patent licenses to remedy violations of the AML⁹². Instead, such orders would be granted at the discretion of the State Council's Patent Administration Department, upon review by the NDRC or the SAIC, coupled with the application by the concerned party⁹³.

The NDRC has also held many seminars with the E.U. and other countries to provide training for enforcement staff and even sent officials to learn in the E.U. on its anti-monopoly laws and enforcement work⁹⁴. On that note, the enforcement of the competition law regime, in particular the AML is evaluated below.

⁸⁴ Above 15, 231

⁸⁵ *ibid*

⁸⁶ *ibid*, 233-234

⁸⁷ Article 24, the Guide

⁸⁸ *ibid*

⁸⁹ Article 20, the Guide

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² SIPO Measures for Compulsory Patent Licensing 2011

⁹³ *ibid*

⁹⁴ Hanghong Wu (2012) *The Chinese Anti-monopoly policy: achievements, problems and prospect* <http://www.jftc.go.jp/cprc/koukai/sympo/2012notice.files/130222sympo6.pdf> (17th July 2013), 11

D. Enforcement evaluation

The AML has been implemented quite successfully over the past 5 years. However, most of the successes are not directly related to IPRs. There are certain aspects on implementing and enforcing the AML that had drawn attention for Chinese lawmakers for future amendments and improvements, such as 1) the inadequacy of AML itself, 2) lack of clarity in Article 55; call for transparency because of the 3) unclear relationship of AML with other applicable competition and IP laws, 4) that unclear relationship between Article 55 and the TRIPS, 5) the Guide not matching with the reality; 6) lack of experience and guidance in adjudication of competition law cases, and lastly, 7) the unclear balance of power between the three AMEAs.

1. Inadequacy of AML

The AML is not adequate in addressing the competition law problems facing China today. For instance, the exemptions under Article 15 may offer some protection for IPR holders, but very often they find it difficult to satisfy the burden of proof for the conditions required, such as consumer benefiting from the agreement⁹⁵. Also, by permitting the most common types of cartel agreements, Article 15 actually significantly weakens the pro-competitive purpose of the AML⁹⁶. Similarly, by requiring similar favourable licenses to be granted to other firms in the market once the license is granted to the original licensee, the AML may have created a compulsory IP licensing system⁹⁷, which discourages innovation rather than encouraging⁹⁸.

Certain provisions of the AML related to the dominant position are vague and require further clarification. Such dominance can be achieved with a market share as low as 10%⁹⁹ in the cases decided¹⁰⁰, while Article 19 AML specifically states that such market share shall not be presumed as dominance and in the Guide, 20%¹⁰¹. Also, the approach which presumes dominant position of multiple entities based on their combined market share is worrying¹⁰². It appears that entities with low market concentration will be punished because there are not a lot of market participants. There is no guidance as to what suffice for them to rebut the presumption¹⁰³. Moreover, the AML does not seek to

⁹⁵ Above 47, 87

⁹⁶ *ibid*

⁹⁷ International Law Office and Lovells (2009) *The Anti-monopoly Law and IP rights: a relationship under strain* <http://www.internationallawoffice.com/Newsletters/detail.aspx?q=3e09021e-ce50-4e11-8f1e-316e3f74eb1d> (17th July 2013)

⁹⁸ Kristie Nicholson and Zirou Liu Avoid competition problems in China (July/August 2008) *Managing intellectual property*

⁹⁹ Frank Schoneveld (2013) *Abuse of IP rights under China's antitrust rules: recent cases have a potentially serious impact* <http://www.mondaq.com/unitedstates/x/230592/Antitrust+Competition/Abuse+Of+IP+Rights+Under+Chinax0027s+Antitrust+Rules> (17th July 2013)

¹⁰⁰ *Interdigital v. Huawei* (2013) Shenzhen Intermediate Court and *Microsoft v. Guangzhou Kam Hing* (2010) Guangzhou Intermediate Court

¹⁰¹ Article 12, the Guide

¹⁰² Harris H. Ganske The monopolization and IP abuse provisions of China's Anti-monopoly Law: concerns and a proposal (2008) 75(1) *Antitrust Law Journal* 213-229, 213

¹⁰³ *ibid*

distinguish between IPR holders who are competitors in the area of the IPR license and those who compete outside¹⁰⁴.

From the statistics, there are too few successful cases of enforcing against violations under the AML. Although the *Dexian v. Sony* case¹⁰⁵ is decided on the AUCL before AML had commenced, the issue is whether Sony had abused its IPRs by tying¹⁰⁶ which AML can be applicable as well. Sony's insistence on using its patented replacement battery was held not to be an abuse of IPR; even though *prima facie* it was dominant over the digital market. There was no evidence of unnecessary technological strategies. SAIC is the AMEA for both laws, so it is likely that it will give the same or similar interpretation to the AML as that in the AUCL. In *Shanda v. Sursen*¹⁰⁷, it was decided that the AML was not violated either. The case is about an unauthorized adaptation of an online novel by two avid fans who were disappointed by the ending. They decided to write an unauthorized sequel to it using the same characters, and published it online which became highly successful. They alleged Shanda to have abused the IPR while they had actually infringed the copyrights of the novel. These cases reflect that AML may be useless in enforcement as the threshold for any competition violation is too high. The AMEAs may have taken an overly-cautious approach, which made the enforcement weak.

Lastly, it is unclear whether the AML has a retrospective or prospective effect as it is silent on the issue. AML is thus inadequate to solve the competition problems.

2. Lack of clarity in Article 55 AML

The language adopted in AML is very general, including Article 55. Certain key terms are not defined, such as to what constitutes to eliminating or restricting market competition, IPRs, or the abuse of IPRs¹⁰⁸. It is unclear whether Chinese medicine, genetic resources or traditional knowledge can be part of an IPR¹⁰⁹. There are almost no cases until present for the AMEAs to interpret the terms¹¹⁰. Currently, among the three AMEAs, only MOFCOM publishes all its decisions of prohibition or conditional approval¹¹¹. Arguably, maximum flexibility is given to the AMEAs to interpret the AML on their own¹¹² and if that does not work, they can always seek for judicial interpretation from the SPC or the State Council, which is a standard Chinese legislative practice. Companies, especially foreign ones, would have no idea whether their conduct has the potential to violate the AML.

¹⁰⁴ Yee Wah Chin Intellectual property rights and antitrust in China (February 2010) *New Jersey Lawyer* 39-43, 40

¹⁰⁵ Above 51

¹⁰⁶ Article 17 AUCL

¹⁰⁷ *Shanda Interactive Entertainment v. Beijing Sursen Electronic Technology* (2009) Shanghai No. 1 Intermediate People's Court

¹⁰⁸ Global Competition Review *Intellectual property and antitrust 2013* London, Law Business Research Ltd 2013, 33

¹⁰⁹ Above 15, 217

¹¹⁰ Michael Jacobs and Xinzhu Zhang "China" in R. Ian McEwin *Intellectual property, competition law and economics in Asia* Oxford *Hart Publishing Ltd* 2011, 153

¹¹¹ Above 66

¹¹² The Guide

Questions have also been raised about the relationship between Article 55 and the general prohibitions under AML, as Article 55 is put under the Supplementary Provisions¹¹³ at the end of the AML. Only Article 55 is particularly addressed to IPRs, which is significantly less compared with other international regimes. Some practitioners and academics therefore view IPRs as an exception to the application of the AML, implying that IP laws are considered to be equivalent in status to the AML, with a safe harbour for IPR holders to exercise their IPRs legitimately. Others argue that AML should be strictly applied to all cases where IPRs are involved¹¹⁴. It is now clarified by the Legislative Affairs Commission of the Standing Committee of NPC that competition law does not apply to all IP aspects but only when the circumstances required are met¹¹⁵. Such however, is not accepted in the E.U. approach¹¹⁶. By categorising Article 55 as a supplementary provision, AML lowers Article 55's status and affects how it connects with the rest of the AML provisions.

Another concern is whether Article 55 extends the prohibition on abuse of dominant position to activities carried out by non-dominant IPR holders¹¹⁷. If so, non-dominant IPR holders will be unable to engage in certain potentially abusive activities. The market share threshold test for the abuse of dominance in Article 19 AML will be irrelevant¹¹⁸. Also, it remains unclear as to whether dominant entities exercising IPRs are subject to the same competition scrutiny as dominant entities selling other goods or services, as IP indeed differs from other types of property¹¹⁹. Article 55 therefore requires further clarification.

3. Unclear relationship between AML and other applicable competition and IP laws

The AML does not explicitly repeal but coexists with many existing applicable Chinese competition and IP laws and regulations, such as those mentioned in Parts A and B above. Based on the general principles of hierarchy¹²⁰, AML as the more recent economy-wide legislation take precedence over previous laws and regulations in cases of conflict, but to the extent they do not contradict it, they may apply concurrently¹²¹.

¹¹³ H. Stephen Harris Jr. and Yizhe Zhang Antitrust and three rising giants: Part 1 – China (2008) *International Company and Commercial Law Review* 339, 345

¹¹⁴ China Law and Practice (2011) *Crossroads: Anti-monopoly and IP rights* <http://www.chinalawandpractice.com/Article/2893305/Channel/16143/Crossroads-Anti-monopoly-and-IP-rights.html> (17th July 2013)

¹¹⁵ The Legislative Affairs Commission of the Standing Committee of NPC *Interpretation, legislative rationale and relevant regulations for the Anti-monopoly Law of the People's Republic of China* Beijing, Beijing University Press 2007, 346

¹¹⁶ Joseph Darke *Abuse of dominant position and intellectual property law* Translated from the German by Yuling Wu "Missbrauch einer marktbeherrschenden Stellung und Recht des geistigen Eigentums" China: Global Law Review [2007(6)]

¹¹⁷ Above 51

¹¹⁸ Dr. George Yijun Tian The impact of the Chinese Anti-monopoly Law on IP commercialization in China & general strategies for technology-driven companies and future regulators (2010) *Duke L & Tech Rev.* 4, ¶24

¹¹⁹ Above 20

¹²⁰ Articles 79 and 83, Legislation Law 2000

¹²¹ *ibid*

It remains true that Chinese competition and IP laws are fragmented, confined in scope and rarely enforced¹²². The problem with dual application is that some laws and regulations differ significantly with AML, for instance, in the amount of penalties for tying, bid rigging and price controls¹²³. The Patent Law 1998 was silent on any IPR abuse while Article 55 AML provides so. Despite the revised Patent Law in 2008 to cater for compulsory licensing¹²⁴, so to harmonise it with the AML, it remains unclear if an infringement under the Patent Law will be subject to both itself and AML. Thus, further clarifications are necessary as IPR owners, in particular the foreign ones, are uncertain about the legal implications behind all the relevant competition and IP laws.

4. Unclear relationship between Article 55 AML and TRIPS

There were concerns that Article 55 AML will have violated Article 40 TRIPS. Article 40 TRIPS provides that China may adopt appropriate measures to prevent or control abuse of IPRs consistently with other provisions of the TRIPS¹²⁵. China acceded to the WTO in 2001 and has an obligation to comply with all WTO agreements, including the TRIPS¹²⁶. Some states had expressed concern as to the compatibility of the phrase “abuse of IPRs” in Article 55 AML as it seems to go beyond what TRIPS considers as abusive practices under Article 31(k)¹²⁷ for compulsory licensing¹²⁸. However, the Chinese representatives assured that Article 55 had not breached the TRIPS and the AML is fully compatible. Any further development on the issue remains to be seen.

5. Unrealistic Guide

Although the Guide has been useful in many ways in assisting the understanding and enforcement of the AML, in many other ways it is somehow unrealistic. Article 11 illustrates certain types of competitive activities, including cross-licensing¹²⁹, without however realising the market reality that cross-licensing can also produce pro-competitive effects, such as reducing the risk of IPR infringements, saving monitoring costs and focusing on innovation¹³⁰. The Guide also provides that a dominant company may not impose unreasonable transactional conditions involving IPRs without justifiable reasons. *Prima facie*, this prohibition would appear to ban a wide category of provisions that are however routinely included in IPRs and settlement agreements, such as the use of a no-challenge

¹²² Hannah Ha and Gerry O'Brien China's Anti-monopoly Law – a great leap forward? (March 2008) *Asia Law* 8-14

¹²³ Above 12

¹²⁴ Article 48 Patent Law 2008

¹²⁵ Article 40 TRIPS

¹²⁶ WTO *Report of the Working Party on the accession of China* WTO 2001, ¶286

¹²⁷ Article 31(k) TRIPS states that: “Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.”

¹²⁸ WTO *Communication from the European Communities under the transitional review mechanism of China* IP/C/W/503 WTO 2007, ¶23

¹²⁹ Article 11, the Guide

¹³⁰ Above 75

clause¹³¹. The European Commission ("E.C.") has examined the issue in the Pharmaceutical sector Inquiry, but it has not made an infringement decision on that clause¹³². It remains unclear whether E.C. will comment further for the Guide to reflect more of the market reality.

Article 17 of the Guide dealing with refusal of license states that AMEAs will not impose a duty to deal with competitors or other parties upon an IPR, but added that the unilateral refusal to license must be unconditional and non-discriminatory¹³³. This will mean that the IPRs holder will only be safe from competition violation if he licenses to everyone or to none, or he will be taking the risks of being challenged by the AMEAs¹³⁴. This is absurd to the original purpose of the AML. Moreover, the Guide does not explain why individual assessments are taken applicable to all operators, when there should be no such requirements for non-dominant operators¹³⁵. So the usefulness of the Guide remains to be improved.

6. Lack of experience and guidance in adjudication

The specialised delegation of the jurisdiction to the IP tribunals may mean that the tribunals have better capacity to deal with the IP abuse cases. But equally they are not better equipped in dealing with competition law issues that are new to them. Sometimes, the courts had not even referred to the matter to the IP tribunal. In *Sursen v. Shanda and Xuanting*, the regular court ruled on the matter without delegating jurisdiction to the IP tribunal¹³⁶, but the parties did not challenge the jurisdiction. Indeed, the jurisprudence and capability of economic analysis on competition law in China are still in development¹³⁷. Judges have limited training to understand the issues. There are no or limited precedents for the AMEAs and the judges to follow. The work of the AMEAs is rarely disclosed and the public always question about the reliability of their decisions, causing distrust among them¹³⁸. Such is reflected in NDRC's decision on agreeing with an early settlement with China Telecom and China Unicom instead of imposing fines on them, which are state-owned enterprises ("SOEs"). The preparation of further interpretations or advice is likely to involve not just the AMEAs but also other enforcement bodies¹³⁹. That means that delays are resulted in publishing the guidance. At the end, it relies on the bodies themselves to implement the laws¹⁴⁰. It is useless if they do not.

Foreign business investors are often worried that the AML will be used abusively against them while the enforcement bodies and the judiciary turn a blind eye on the domestic and SOEs¹⁴¹. They

¹³¹ *ibid*

¹³² E.C. *Pharmaceutical sector inquiry final report* E.C. 2009

¹³³ Article 17, the Guide

¹³⁴ Above 77

¹³⁵ *ibid*

¹³⁶ *Sursen v. Shanda and Xuanting* (2009) Shanghai No. 1 Intermediate People's Court

¹³⁷ Above 110

¹³⁸ Above 66

¹³⁹ Above 66

¹⁴⁰ X. Wang The prospect of antimonopoly legislation in China (2002) *Washington University Studies Law Review* 201-232

¹⁴¹ Mary Hanzlik The implications of China's Anti-monopoly Law for investors: problematic protection of intellectual property (2008) 3(1) *Entrepreneurial Bus. L.J.* 75, 89

are concerned that the AML will be used as a defense to avoid or delay infringement actions involving Chinese parties, as the anti-monopoly investigation process once initiated is very time-consuming¹⁴². As discussed, Chinese officials often claim that China is plagued with foreign technology businesses that use unfair competition tactics¹⁴³. Under local protectionism, judges tend to be biased in favour of the SOEs, supported by local committees or local people's congresses¹⁴⁴. The authorities are unlikely to offend them because of the pressure that they would lose the tenures, benefits or even be removed for a verdict that the local government is not pleased with¹⁴⁵. Additionally, local courts may suffer from significant funding reductions if they do not take government interests (which are about SOEs) seriously¹⁴⁶. This lack of independence has a significant impact on the prosecution of pharmaceutical counterfeiters especially. Therefore, many companies, foreign and local, call for a shift in the enforcement focus to the SOEs as they are likely to abuse their administrative power to achieve dominance. Same standards should be adopted for both domestic and foreign businesses.

7. Unclear division of labour among three AMEAs

Lastly, the enforcement aspect of the AML in relation to IPRs is weak¹⁴⁷. Firstly, it is due to the unclear division of labour among the three AMEAs. The AMC does not have substantive enforcement powers but formulates competition policies and guidelines, evaluates competition conditions, coordinates enforcement activities and reports back to the State Council¹⁴⁸. The AMEAs on the other hand, have strong powers¹⁴⁹, including the power to inspect and investigate business and non-business premises, and seize relevant evidence without a court order. However, the AML does not detail the structure of the AMEAs¹⁵⁰. All three AMEAs have been struggling for more power. Despite the seemingly clear division of responsibilities as discussed, the NDRC had once issued notice with respect of a case while the SAIC should have been the best candidate to decide. It was a case on the tying of wholesale of table salt with detergent washing powder¹⁵¹. Clearly it is a non-pricing practice which SAIC has the power to decide.

Each of the AMEAs, such as the NDRC and the SAIC had implemented rules respectively on the implementation of the AML¹⁵². But the level of detail in the rules is limited. However, they were not

¹⁴² Above 15

¹⁴³ H. Harris Stephen Jr. The making of an antitrust law: The pending Anti-monopoly Law of the People's Republic of China (2006) 7 *Chi. J. Int'l L.* 169, 173

¹⁴⁴ Huang Ying Basic IP principles of antitrust Law (August 2010) 38 *China IP Magazine*

¹⁴⁵ Albert Hung-yea Chen *An introduction to the legal system of the People's Republic of China* Hong Kong, LexisNexis 2004, 157

¹⁴⁶ *ibid*

¹⁴⁷ U.S. International Trade Administration *IPR toolkit: protecting your intellectual property rights (IPR) in China* U.S. Department of Commerce 2005

¹⁴⁸ Above 12

¹⁴⁹ Articles 10 and 39 AML

¹⁵⁰ Adrian Emch The Antimonopoly law and its structural shortcomings 2008(1) *Global Competition Policy Magazine*

¹⁵¹ NDRC decision against Wuchang Branch of Hubei Salt Industry Group Co. Ltd 2010 (the Washing Powder case)

¹⁵² SAIC Regulations on Prohibition of Monopoly Agreements 2010, SAIC Regulations on Prohibition of the Abuse of a Dominant Market Position 2011 and the NDRC Regulations on Anti-Price Monopoly 2010

deterred in enforcing what they consider to be relatively obvious anti-competitive domestic horizontal cartel activities, which have been the main focus of enforcement in other laws before the AML commenced. In relation to other types of agreements, this means that there is ongoing uncertainty as to which agreements can or will be challenged under the AML¹⁵³.

Secondly, the weak enforcement is because of the complex government structure. On a higher policy level, there are five levels of government and more than a dozen other governmental departments called “competition liaison agencies” across the geographical spread¹⁵⁴, such as sector regulators, financial regulators and even the police and national security agencies. There are problems of allocation of enforcement responsibilities among the three AMEAs and other enforcement bodies with jurisdiction potentially overlapping and conflicting with each other¹⁵⁵. The lack of clarity on legal enforcement in general has been an institutional problem in China which hinders the efficiency and effectiveness of law enforcement as a whole¹⁵⁶. Due to the influx of parties seeking to obtain IPRs, the AMEAs had allocated a significant portion of their budgets and personnel to reviewing the IPRs applications. There were limited resources left to handle the investigation and adjudication of IPR infringement claims¹⁵⁷. The complex division of labour among the AMEAs has worsened the competition enforcement and this has to be changed.

E. Summary

In summary, the implementation of the AML over the 5 years was sparingly successful. AML needs clarity and guidance for the application of the articles, especially on Article 55; transparency as to how different competition and IP laws and rules, such as the TRIPs interact with the AML and a better enforcement mechanism among the AMEAs and other enforcement bodies. The enforcement should aim more at the SOEs rather than foreign businesses. The NDRC and the SAIC had stated in August 2012 that they would increase transparency of their enforcement actions under the AML¹⁵⁸. Some basic information of the investigation would be stated clearly to the public, such as what procedures to follow in order to apply for leniency, when the business operator under investigation will be notified, and how fines are calculated and determined. It remains to be seen that a single agency, fair and independent¹⁵⁹, will be established to be responsible for the enforcement and implementation of both the AML and other competition laws¹⁶⁰. Alternatively, specific guidelines on the division of labour among the AMEAs and other enforcement bodies will be available if the current model is kept. Conflicts between them can be reduced and capacity-building within each of them can be enforced. Lastly, a specific IP and competition piece of legislation may be desirable, instead of relying on Article 55 AML only, combining various applicable laws and regulations and with a clearer structure.

¹⁵³ Above 66

¹⁵⁴ Above 12

¹⁵⁵ Above 110

¹⁵⁶ *ibid*

¹⁵⁷ Above 12

¹⁵⁸ Above 77

¹⁵⁹ David Tang and Bill Zhang (2007) *The PRC's New Antimonopoly Law has a long way to go* <http://www.mondaq.com/article.asp?articleid=54318> (17th July 2013)

¹⁶⁰ Jiao Wu “Calls for a single anti-monopoly agency” *China Daily* 14th December 2007, 3

Gerald F. Mosoudi, Deputy Assistant Attorney General of the Anti-trust division of DOJ in the U.S. commented that the Chinese government has indeed demonstrated its openness to the ideas and experiences of competition law enforcers worldwide in the enforcement of the competition law regime¹⁶¹. Definitely China can look into more of the established approaches in the E.U., to improve on the existing regime, especially on the application of the AML. China should also continue to increase the reward to foreign investors and induce more innovation¹⁶².

IV. COMPARISON WITH THE E.U. APPROACHES

Different international approaches vary in the degree of seriousness with which competition laws are enforced and the right institutional approach to competition protection and whether it is best done administratively or judicially¹⁶³. Note however that there is still no consensus as to the definition of some key elements, such as “competition” and “anti-competitive”. Chinese AMEAs can draw on lessons from countries with well-established regimes with more advanced IP and competition laws, such as the E.U. The two approaches have been well-established for many years and are models for many competition law regimes in the world. Most importantly, China can learn from the success as well as avoiding the wrong turns they had made. But it is equally important to understand how the regimes deal with the interrelation between IPRs protection and competition law enforcement. The different political and cultural beliefs behind the regimes inevitably lead to different answers in dealing with IPRs enforcement, not just because they ascribe to different schools of economic thought¹⁶⁴.

E.U.

The E.U. is an established regime and is mostly laid out in the Treaty on the Functioning of the European Union¹⁶⁵ (“TFEU”). It prohibits anti-competitive agreements¹⁶⁶, abuses of dominant position¹⁶⁷ and patent misuse, and governs SSOs. The AML finds many resemblances to the TFEU. The general prohibitions of AML such as Articles 13 to 16 reflect Articles 101 and 102 TFEU. Article 101 prohibits agreements to restrict prices when licensee sells goods to third parties, impose no-challenge clauses, prohibit licensee from supplying from anyone, restrict reselling to certain types of customers, and impose exclusive grant-backs or assignment-back obligations¹⁶⁸. Article 102 describes four ways of a dominant position: tying, refusal to license, unfair pricing and excessive pricing¹⁶⁹. Standard-setting may raise particular competition concerns, such as a patent ambush¹⁷⁰,

¹⁶¹ Above 35, 646

¹⁶² *ibid*

¹⁶³ Honourable Chief Justice Robert French *Unleashing the tiger? – Competition law in China and Hong Kong* Melbourne Law School Conference 2008

¹⁶⁴ R. Ian McEwin *Intellectual property, competition law and economics in Asia* Oxford Hart Publishing Ltd 2011, 17

¹⁶⁵ Treaty on the Functioning of the European Union 1957

¹⁶⁶ Article 101 TFEU

¹⁶⁷ Article 102 TFEU

¹⁶⁸ Above 166

¹⁶⁹ Above 167

¹⁷⁰ Article 101(3) TFEU

where the patent holder fails to inform a SSO about the relevant patent, similar to the suggestion in the Guide. Other examples include an inadequate standardization process with standard-setting procedures that are not sufficiently open and transparent, compulsory licensing and standards manipulation. But as discussed, there are no such equivalent provisions in the AML.

The AML is very similar to the TFEU. Articles 17 to 19 AML are similar to Article 102 TFEU, and the pre-merger notifications are similar to that in Articles 86 and 87 TFEU respectively. Both the E.U. approach and AML has no criminal liability system for violation of the laws but rely on fines. The presumption of dominance is 50%¹⁷¹, which is higher than that in Article 19 AML. The burden of proof lies similarly on the claimant or the enforcement authority¹⁷². Again, there is no equivalent Article 55 in the TFEU¹⁷³.

The Guide resembles the four-prong test from the E.U. approach: firstly, the agreement must contribute to improving production or distribution of goods or promoting technical or economic progress; secondly, the restrictive conduct must be indispensable to achieve the efficiency; thirdly, that efficiency must be shared with consumers; and lastly, the restrictive conduct will not severely impede competition in the relevant market¹⁷⁴. But requiring a dominant firm to grant access to its essential IPR under Article 18 of the Guide¹⁷⁵ is a departure from the *IMS Health* case¹⁷⁶, as it is not only about the secondary market as stated in the case, but the market at the same level as in the Guide. Plus, the Guide does not stress the preclusion of a new product and objective justification elements while listed in Article 15 AML¹⁷⁷, thus expanding the essential facility doctrine improperly and opening potential floodgates for more IPR infringements. Although China is in no way bound to follow E.U. law, some insight may continue to be gained by learning from the E.U. approach¹⁷⁸.

V. LESSONS FOR CHINA

To As the Chinese saying goes, it is best to learn from everyone and gather the wisdom¹⁷⁹. Mindful of China's specific social and economic circumstances rather than uncritically importing legislative models from other approaches¹⁸⁰, there is no 'one size fits all' approach for China. It is argued that China can certainly learn from the Block Exemptions approach adopted by the E.U. for horizontal agreements.

¹⁷¹ AKZO Chemie (1991) C-62/86 ECRI-3359

¹⁷² Above 64

¹⁷³ Above 113

¹⁷⁴ Above 77

¹⁷⁵ Article 18, the Guide

¹⁷⁶ *IMS Health GmbH & Co. OHG. v. NDC Health GmbH & Co. KG.* (2004) C-418/01

¹⁷⁷ Above 114

¹⁷⁸ Above 51

¹⁷⁹ In Chinese: “集思廣益”

¹⁸⁰ Above 110

Block Exemptions from the E.U. approach

Similar to Article 15 AML and Article 12 of the Guide with a list of the safe harbour rules, the Block Exemptions from the E.U. approach are highly suitable for AML to adopt, in particular, the 2004 Technology Transfer Block Exemption Regulation¹⁸¹ (“TTBER”) for technology transfer. As well, other specialisation agreements on unilateral and reciprocal specialisation, and joint production are suitable for China¹⁸². These are attempts to exclude the application of Article 101(1) TFEU¹⁸³. The TTBER prohibits exclusive grant-back obligations of a licensee’s own severable improvements, no-challenge clauses and restrictions on the licensee’s ability to exploit its own technology or on its ability to develop new technology where the license is granted to a non-competitor¹⁸⁴. It is very detailed in contrast with the Guide. It aims to strike a delicate balance between granting rights broad enough to create incentives for innovation, but at the same time not so broad as to hamper further improvements for competitors¹⁸⁵. It allows firms to formulate their licensing agreements according to their commercial and business needs¹⁸⁶. But TTBER only applies to bilateral agreements at present. It should include more IP-related agreements that can affect competition law¹⁸⁷, which China may consider expanding its scope to cover the above deficiencies and to multi-party licensing agreements as well. Note however that the market share threshold combined in the TTBER is 20%¹⁸⁸, not 10%. It remains a problem for China to keep such a low threshold.

Conclusion

It has been a longstanding debate as to how to “marry the innovation bride and the competition groom”¹⁸⁹ in China. The competition law regime in China in particular with the AML had implemented quite efficiently to provide IPRs protection, alongside with other competition and IP regimes. Still, the regime is relatively young and there are many areas of improvement, on improving clarity, transparency with other laws, including the TRIPS and better enforcement structure. China should continue to learn from the approaches taken by developed regimes in the E.U.. As the economic

¹⁸¹ Commission Regulation (EC) No. 772/2004 of 27th April 2004 on the application of Article 81(3) TFEU to categories of technology transfer agreements

¹⁸² Commission Regulation (EC) No 2658/2000 of 29th November 2000 on the application of Article 81(3) TFEU to categories of specialisation agreements

¹⁸³ Commission Regulation (EU) No 1218/2010 of 14th December 2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements

¹⁸⁴ Article 5(1), TTBER

¹⁸⁵ Willard Tom *Summary in competition law and innovation* OECD 1998, 455

¹⁸⁶ Christina Aristidou (2010) Cyprus: the EU has/has not achieved a proper balance between competition law and intellectual property
<http://www.mondaq.com/x/83430/Antitrust+Competition/The+EU+Has+Not+Achieved+A+Proper+Balance+Between+Competition+Law+And+Intellectual+Property> (17th July 2013)

¹⁸⁷ A. Dolmans and A. Piilola The proposed new Technology Transfer Block extension: is Europe really better off than with the current regulation? (2003) 26(4) *World Competition* 541

¹⁸⁸ Above 181 ¶13

¹⁸⁹ Mario Monti *The New EU Policy on Technology Transfer Agreements* Paris 2004

reform in China deepens, the breadth and depth of law enforcement will get better, which is highly desirable¹⁹⁰.

As the former Prime Minister Wen Jiabao once said, the competition of the world's future, including China, is the competition in IP¹⁹¹. There is hope for China's AML and the competition law regime to develop for better IPRs protection and keep up with the traditional Chinese culture of encouraging innovation and improvement throughout.

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¹⁹⁰ Huang Ying China's antitrust law enforcement after the 18th party congress February 2013 (2) *CPI Antitrust Chronicle* 4

¹⁹¹ Wen Jiabao Opening ceremony of the National People's Congress Beijing 2013

MAKING MUCH ADO ABOUT THEORY: THE CHINESE TRADEMARK LAW

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Although the United States has had an active hand in the implementation of trademark law in China over the past century, the same frustrations that marked the turn of the twentieth century are reflected in the twenty-first century. This Article posits that one of the reasons that the United States has not seen the desired level of progress in China's protection of trademarks lies in the imposition of an American theory of trademarks, which has inhibited U.S. reform efforts in China to date. This imposition is understandable, as little thought has been given to the Chinese theoretical justification for their trademark laws by American or Chinese scholars. However, this lack of understanding is at the root of the tension between the two countries. Such continued confrontation between the United States and China will not be productive since it will not bring about sustained change in China.

This Article will attempt to fill in this scholarly gap and provide a comprehensive and comparative analysis of the Chinese Trademark Law. Such analysis will show that a type of social planning theory has been unconsciously adopted for the theoretical justification of the Trademark Law. With this analysis, a better understanding of the Chinese perspective of trademark law can emerge. This understanding is the first step towards an improvement of the U.S. reform efforts in China and will also provide the United States with the ability to assist China with understanding its own theoretical justifications for the Trademark Law. With new revisions pending to the Trademark Law and the increased focus of the Chinese government on intellectual

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property matters due to the recent 2008 Beijing Olympics and the upcoming 2010 Shanghai World Expo, the time is ripe for an internal education campaign to analyze and understand what has been unconsciously adopted over the last two decades. A better informed dialogue will benefit both the United States and China and assist the Chinese with creating a platform for deep-rooted, long-term change in their protection of trademarks.

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I. INTRODUCTION

It is the view of our Government that the judicial protection of American trade-marks in China, against the infringement or dealing in infringements by Chinese vendors, is an absolute

treaty obligation undertaken by the Chinese Government which cannot be suffered to be questioned¹

In 2008, the Administration will continue its concerted efforts to ensure that China fully . . . adheres to its fundamental obligations as a WTO member, with particular emphasis on . . . lowering [intellectual property rights] infringement levels in China²

These two statements, reflective of the U.S. view of China's protection of intellectual property rights, could have been made contemporaneously, but for the fact that the first statement was written in 1915 and the second in 2007. Why has the U.S. view³ of China's⁴ protection of intellectual property not changed over the course of almost a century of intense negotiations and brinksmanship?⁵ There have been some improvements in recent years, as the past twenty-plus years has seen more progress than in the first two decades of U.S. activism in China.⁶ For example, China passed its first modern trademark law in 1982; amended that law twice in 1993 and 2001;⁷ ascended to the World

1. WESTEL W. WILLOUGHBY, FOREIGN RIGHTS AND INTERESTS IN CHINA 180–81 (1920) (quoting the Letter of the American Minister at Peking of June 16, 1915 to the American Consul-General at Shanghai).

2. OFFICE OF U.S. TRADE REP., 2007 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 11 (Dec. 11, 2007) [hereinafter 2007 REPORT].

3. This Article refers to the position and attitudes of the Office of the United States Trade Representative (U.S.T.R.) as those of the U.S. government, since the U.S.T.R. is "the key U.S. government agency charged with pursuing U.S. trade policy." ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 52 (2005). In addition, the views of the U.S.T.R. incorporate the views and concerns of U.S. businesses. *See id.* at 56–66.

4. This Article uses the term "China" as an umbrella reference for mainland China that includes both the time period before the founding of the People's Republic of China in 1949 and thereafter.

5. The United States first began its involvement in China to protect American intellectual property rights at the turn of the century with the treaty that ended the Boxer Rebellion, signed in 1903. *See Treaty Between the United States and China for the Extension of the Commercial Relations Between Them*, U.S.-China, Oct. 8, 1903, 33 Stat. 2208, art. II, T.S. No. 430.

6. From 1903 to 1923, the United States was very active in its demands that China adhere to its treaty obligations, and the first official trademark law was passed in 1923 by the Republican government. However, not long after the passage of this law, the events of World War II began to unfold, and subsequently, little progress was made on trademark laws in China. After cutting off diplomatic relations with China from 1949 to 1979, the United States re-initiated its activism in the late 1980s. For a background of the intense negotiations and brinksmanship from 1989 to 2000, *see MERTHA, supra* note 3, at 41–52.

7. Shangbiao fa [Trademark Law of the People's Republic of China] (adopted by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, first amendments adopted by the Standing Comm. Nat'l People's Cong., Feb. 22, 1993, and second amendments adopted by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001) 2001 FA GUI HUI BIAN 112 (P.R.C.) [hereinafter Trademark Law], available at <http://english.ipr.gov.cn/ipr/en/info/Article.jsp?>

Trade Organization ("WTO") in 2001 and, as a result, became a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").⁸ In addition, China is currently drafting a third amendment to the Trademark Law that will result in its complete overhaul.⁹ However, the United States feels there is much more still to be done.¹⁰ The U.S.T.R. points to the problems in China of enforcing intellectual property laws, as such enforcement is bogged down by a variety of seemingly insurmountable issues.¹¹ The U.S. Customs and Border Protection shows that for the fiscal year 2007, approximately 80 percent of the counterfeit products seized originated in China.¹² Of these seized products, approximately 61 percent were counterfeited footwear, apparel and accessories, which were worth about \$118.9 million.¹³

This Article posits that one of the reasons why the United States has not seen the progress it desires in China is due to an inappropriate imposition of the U.S. theory of trademark law onto the Chinese system.¹⁴ Since the United States has viewed the Chinese trademark laws through the lens of U.S. theory, negotiators¹⁵ have crafted their arguments and

a_no=2170&col_no=119&dir=200603. Reference to the Trademark Law in this Article also includes the implementing regulations and the binding interpretations issued by the Supreme People's Court. *See infra* note 169 and accompanying text. There are also a number of other measures that may affect trademark protection in China (such as criminal laws or customs regulations).

8. Agreement on Trade-Related Aspects of Intellectual Property Rights, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 1C, 33 I.L.M. 1125, 1197 [hereinafter TRIPS].

9. Lisa Wang, *China's Evolving Trademark Law: Key Changes in the Third Draft Amendment*, CHINA L. & PRAC., Feb. 2008, at 36, available at LEXIS (China Law & Practice file).

10. *See* OFFICE OF U.S. TRADE REP., 2008 SPECIAL 301 REPORT 19 (Apr. 30, 2008) [hereinafter 2008 SPECIAL 301 REPORT] ("The United States recognizes and appreciates the efforts of the many officials in China who continue to give voice to China's commitment to protecting intellectual property rights and are working hard to make it a reality. In spite of these efforts, the shared goal of significantly reducing [intellectual property rights] infringement throughout China has not yet been achieved.").

11. *See id.* at 21 ("[E]nforcement efforts, particularly at the local level, are hampered by poor coordination among Chinese Government ministries and agencies, local protectionism and corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes.").

12. U.S. CUSTOMS & BORDER PROTECTION, INTELLECTUAL PROPERTY RIGHTS SEIZURE STATISTICS: MID-YEAR FY 2008, at 2 (May 2008), available at http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy07_final.ctt/fy07_final.

13. *Id.* at 7. In addition, counterfeit footwear originating from China accounted for 98 percent of all seized counterfeit footwear. *Id.* at 6.

14. The U.S. theory of trademark law is widely acknowledged to be utilitarianism. *See infra* note 24.

15. The term "negotiators" refers to all entities that have tried to persuade China to revise its trademark laws, including the U.S.T.R., non-governmental organizations, such as the U.S. Chamber of Commerce, and U.S. businesses.

talking points based upon this U.S. theory, which has not resonated well with their Chinese counterparts.¹⁶

Arguably this imposition is understandable because there has never been a comprehensive analysis of the underlying theory of the Chinese trademark laws published in the United States or China.¹⁷ As a result, the United States has not had the opportunity to understand Chinese trademark laws from a Chinese perspective. While the United States has adopted a utilitarian justification for its trademark laws,¹⁸ it would be tempting to assume that China has done so as well, because the United States has had a heavy hand in implementing and revising China's current trademark laws since the late 1980s.¹⁹ However, China has not adopted this justification.

This Article will attempt to fill in the scholarly gap in the underlying theories and provide a comprehensive and comparative analysis of the Chinese Trademark Law. This analysis will show that a type of "social planning theory" has been adopted by China, with distributive and welfare components.²⁰ With this analysis, a better understanding of the Chinese perspective of trademark law can emerge, which is the first step towards improving U.S. reform efforts in China.²¹

16. An example that highlights the misapplication of U.S. theory and the conflict between the two countries is the WTO dispute settlement filed by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (DS362). See Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007) [hereinafter *Panel Request*]. The arguments put forth by the United States contain utilitarian-based concerns such as free-riding, which have not proven effective with the Chinese government. The lack of effectiveness can be inferred from the need to begin the dispute settlement process. See *infra* note 226. The U.S. utilitarian concerns are stated fully in the *First U.S. Submission*, see *infra* note 257, as well as in the *Second U.S. Submission*, see *infra* note 234. For a discussion of these utilitarian-based concerns contained within the *Panel Request*, *supra*, and their application, see *infra* Part V.A.

17. To borrow liberally from Shakespeare, "much ado" has not been made about the theory of the Chinese Trademark Law.

18. See sources cited *infra* note 24.

19. Almost concurrently with the naming of China to the priority watch list under Special 301 in 1989, China and the United States concluded a Memorandum of Understanding. See Structural Impediment Initiatives, the Semiconductor and Construction Agreement with Japan, and Multilateral Talks of Shipbuilding Subsidiaries: Hearing Before the Int'l Trade Subcomm. of the S. Fin. Comm., 102d Cong. (1991) (statement of Joseph Massey, Asst. U.S. Trade Rep.). U.S. activism has been almost non-stop since. See generally MERTHA, *supra* note 3 (presenting an in-depth analysis of the external pressure on China's intellectual property laws by the United States).

20. The phrase "social planning theory" was coined by Professor William Fisher as a way to group together various components that fit under the same theoretical umbrella. See William W. Fisher, III, *Property and Contract on the Internet*, 73 CHI.-KENT. L. REV. 1203, 1215 (1998) [hereinafter, Fisher, *Property & Contract*].

21. The second step, which is reconciling the two different theoretical frameworks, is beyond the scope of this Article.

The remainder of this Article is divided into four parts. Part II will provide a background in the theoretical conflict between the United States and China. Part III will then lay a theoretical and historical foundation with a brief discussion of the utilitarian and social planning theories, followed by a comparative review of American and Chinese history of trademark law. Part IV analyzes the text of the Lanham Act and the Trademark Law in order to demonstrate that the Chinese have adopted a social planning theory of trademark law. While this Article attempts only to provide the first step towards improving the U.S. efforts in China, two potential applications of such understanding of the Chinese theoretical framework can be used immediately. Part V discusses these two potential practical applications: first, a reframing of the discussions between the United States and China, and second, an improvement of the educational initiatives that are aimed at China.

II. DEFINING THE PROBLEM

The conflict between the United States and China reflects Professor Margaret Chon's question, the "[intellectual property] balance question . . . [is] which social group (creators or users) is entitled to use of a particular type of social good (that is, an [intellectual property]-protected knowledge good."²² With respect to trademarks, the United States is trying to increase the protection its businesses (as trademark creators) receive in China for its trademarked brands and China (as a trademark user) is attempting to provide protection for such trademarks but also allow access to the goodwill of such brands as a method of wealth redistribution.²³

In attempting to resolve this conflict, the United States has approached the issue with arguments based on its theoretical framework for trademark law: utilitarianism.²⁴ Such an approach has ignored that China

22. Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 808 (2007).

23. See *infra* Part IV.B.

24. See, e.g., ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 10 (4th ed., 2006) ("Utilitarian theory, and the economic framework built upon it, has long provided the dominant paradigm for analyzing and justifying the various forms of intellectual property protection."); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 59 (2001) ("[T]he basic ideological commitment of American intellectual property is actually heavily utilitarian, not Lockean or Hegelian. The Supreme Court has held consistently and unanimously that American law explicitly treats intellectual property rights in utilitarian terms, as limited monopolies granted to the extent necessary to create incentives for production."); see also Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2105-08 (2004) (summarizing the standard economic justification for trademark law in the United States); Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH.

has adopted a social planning theory for its trademark laws, embodying consumer welfare and distributive concepts. Of the two concepts, the distributive concept lies at the root of the conflict; gaining an understanding of this concept from the Chinese perspective is crucial to an eventual reconciliation of the two perspectives.

Wealth redistribution is one way that the Chinese government is attempting to foster its economic development vision, which is to "eliminate poverty without polarizing society into rich and poor strata."²⁵ Chinese policymakers firmly believe that trademarks are one of the keys to economic success.²⁶ First, providing some trademark protection lures foreign investment into China (through manufacturing and other business investment).²⁷ This foreign investment, in turn, creates a positive effect on industrial development in China.²⁸ Redistribution of the wealth stemming from trademark protection²⁹ provides a base to Chinese entities to build up their own brands and create its own domestic businesses.³⁰

TELECOMM. & TECH. L. REV. 189, 194, 249 (2006) (acknowledging that utilitarianism, or economic theory, provides the main justification for trademark law in the United States).

25. CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING 29 (1995) (quoting Deng Xiaoping).

26. See, e.g., SAIC Deputy Director Li Dongsheng: *Development of Administrative Trademark Protection in China*, June 14, 2007, <http://www.china.org.cn> (translated and available at <http://www.english.ipr.gov.cn> (follow "News" hyperlink; then follow "Government" hyperlink) [hereinafter *Protection in China*]).

27. See Keith E. Maskus, Sean M. Dougherty & Andrew Mertha, *Intellectual Property Rights and Economic Development in China* in INTELLECTUAL PROPERTY AND DEVELOPMENT 295, 300 (Carsten Fink & Keith E. Maskus eds., 2005) (explaining that trademark protection provides incentives for "entry of new firms and development of new products with quality guarantees," which then positively effects industrial development in the domestic market).

28. See *id.*

29. See Wang Qishan, Opinion, *No More Chinese Knock-Offs*, WALL ST. J., June 17, 2008, at A23 ("[China] will ensure a better mesh of our [intellectual property rights] policy . . . to uphold people's rights to properly use the information and fruits of innovation in ways permitted by law . . . and make sure that innovation achievements are shared more equitably."); see also *Newsletter Regarding IPR*, CHINA DAILY, Feb. 19, 2008 (translated and available at <http://www.english.ipr.gov.cn> (follow "Activities" hyperlink; then follow "Newsletter regarding IPR" hyperlink) (former Vice Premier Wu Yi stated, "The progress [China has made] in [intellectual property rights] protection has safeguarded the legitimate rights of [intellectual property rights] owners and guaranteed fair economic order."). Court cases give additional evidence of this strategy; for example, Pfizer was not allowed to claim the exclusive use of the mark "wei ge" for their Viagra drug, allowing other new market entrants to use the popular name for similar drugs. See *Pfizer Appeals After Losing Battle for Chinese Name of Viagra*, XINHUA, Feb. 7, 2007, available at LEXIS (Xinhua General News Service file). However, Pfizer did win a ruling that its trademarked shape for Viagra could be protected from infringement. See *Viagra Trademark Protection Is Dangerous for Chinese Drug Makers—Lawyers*, CHINA BUSINESS NEWS ON-LINE, Dec. 28, 2006, available at LEXIS (China Business News On-Line file).

30. China Starts "Trademark Strategy" Plan, IPR IN CHINA, May 23, 2008, <http://www.english.ipr.gov.cn> (follow "News" hyperlink; then follow "Government" hyperlink)

This conflict over trademark protection in China has been ongoing for the last century.³¹ The U.S.T.R. has consistently placed China at the top of its list of countries that do not provide adequate intellectual property protection.³² In contrast, China has objected to this label, claiming to be compliant with its obligations to the United States and the international community.³³ Until China's ascension to the WTO in 2001, the United States was able to use coercive tactics, such as trade sanctions, when negotiations broke down in order to induce change in China.³⁴ Since 2001, the ability of the United States to use such tactics has been greatly reduced,³⁵ so when the United States has since resorted to similar tactics (such as its Special 301 review process or filing DS362), the lack of cooperation from the Chinese resulted in very little progress.³⁶ In recent decades, the conflict has escalated, as highlighted by the WTO DS362 dispute.³⁷ While the United States has only included three spe-

("The development of China's own brands is still weak compared to other countries, which does not fit China's status in global economy and trade."); Zeng Peiyan: *To Speed Up Development of Products with Independent IP Brands*, SIPO, Dec. 28, 2007, http://www.sipo.gov.cn/sipo_English (follow "News" link; then follow "IPR Special" Link).

31. See *supra* note 5.

32. China has been on the U.S.T.R.'s priority watch list since 2005. See OFFICE OF THE U.S. TRADE REP., 2005 SPECIAL 301 REPORT 1 (Apr. 29, 2005); OFFICE OF THE U.S. TRADE REP., 2006 SPECIAL 301 REPORT 1 (Apr. 28, 2006); OFFICE OF THE U.S. TRADE REP., 2007 SPECIAL 301 REPORT 2 (Apr. 30, 2007); 2008 SPECIAL 301 REPORT, *supra* note 10, at 10.

33. *West Wrong to Criticize IPR Record: Official*, IPR IN CHINA, Apr. 24, 2007, <http://www.english.ipr.gov.cn> (follow "News" hyperlink; then follow "Government" hyperlink).

34. See Peter K. Yu, *The Sweet and Sour Story of Chinese Intellectual Property Rights*, in *TECHNOLOGY, PROGRESS AND PROSPERITY: A HISTORY OF INTELLECTUAL PROPERTY AND DEVELOPMENT* (Graham Dutfield and Uma Suthersanen eds., forthcoming 2008) (manuscript at 1, available at www.peteryu.com/sweetsour.pdf) [hereinafter Yu, *Sweet and Sour*].

35. While the United States still threatens to use U.S. trade laws to force China to implement its WTO obligations (see 2007 REPORT, *supra* note 2, at 11–12), it is questionable whether the United States intends to employ sanctions before exhausting all other WTO remedies. See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶¶ 7.95–.97 WT/DS152/R (Dec. 22, 1999).

36. See *U.S. Piracy Complaints Against China Will Seriously Damage Cooperation: Vice Premier*, Apr. 24, 2007, XINHUA, available at LEXIS (Xinhua General News Service File) (Vice Premier Chair Wu Yi stated, "[The WTO complaint] will seriously undermine bilateral cooperation on intellectual property rights (IPR) under the Joint Commission on Commerce and Trade framework . . ."); Scott Otteman, *U.S., China to Fight Legal Battle on IPR Enforcement in WTO Next Week*, INSIDE US-CHINA TRADE, Apr. 9, 2008, available at LEXIS (Inside US-China Trade) ("After the U.S. filed the two [intellectual property rights]-related cases last year, Chinese bilateral cooperation on improving its enforcement of [intellectual property rights] has largely ground to a halt as Chinese officials expressed dismay over the legal filings."); see also 2007 REPORT, *supra* note 2, at 78. After suspending all intellectual property-related dialogue with the United States due to the WTO filings in April 2007, China finally agreed to recommence the dialogue with the United States regarding intellectual property protection in June 2008. See Scott Otteman, *China Agrees to Restart Bilateral IPR Talks, Releases National Plan*, INSIDE US-CHINA TRADE, June 18, 2008, available at LEXIS (Inside US-China Trade).

37. See *infra* Part V.A.

cific areas of Chinese policy and law that the United States alleges violates TRIPS,³⁸ there are a number of other items that the United States believes need to be changed as well.³⁹ Thus, notwithstanding the outcome of the WTO panel report,⁴⁰ the conflict between the two countries will undoubtedly continue unless there is a change in U.S. strategy.⁴¹

The first step in improving the success of U.S. efforts in China, and potentially even reconciling the conflict between the two countries, is for the United States and China to come to an understanding of the Chinese social planning theory that underlies the Chinese Trademark Law.⁴² A continued misapplication of the U.S. utilitarian theory of trademark law (and an ignorance of the Chinese theoretical framework) will not produce long-lasting change in China, as it ignores the Chinese goals for its trademark law, in addition to causing anger and tensions in both countries.

This Article aims to assist American policymakers by providing them with the needed understanding of the Chinese theory of trademark law. In addition, this Article will remedy the self-admitted confusion of Chinese policymakers and jurists through a comprehensive analysis of this theory. China's current trademark laws have not been effectively

38. See *id.*

39. See, e.g., 2008 SPECIAL 301 REPORT, *supra* note 10, at 22 (internet counterfeiting and piracy), 23 (retailing of counterfeit and pirated products, utilizing specialized intellectual property courts, etc.).

40. The WTO released its panel report for this dispute, DS362, on January 26, 2009. See Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter DS362 Panel Report]. The Panel found partly in favor of China and partly in favor of the United States. See *id.* ¶ 8.1.

41. See *supra* note 35. While it may be in China's best interest to implement short-term policies, such as government-sponsored anti-counterfeiting raids and campaigns in order to show the United States and the international community that China is committed to effective trademark protection (as was recently seen with the 2008 Beijing Olympics), history provides evidence that such policies are likely to be short-term and superficial. See MERTHA, *supra* note 3, at 144; MOFCOM and SAIC Require Strict IPR Protection During Olympic Period, IPR IN CHINA, July 23, 2008, www.english.ipr.gov.cn/en/news.shtml [hereinafter *Strict IPR Protection*] (follow "More" hyperlink under "Government" section). Persuading China that longer lasting change is needed requires an understanding of the theory underlying such laws in order to better craft persuasive arguments.

42. The Chinese acknowledge a need for a theoretical understanding. See National Working Group for IPR Protection, *China's Action Plan on IPR Protection 2007*, June 4, 2007, pt.II.X.(III), http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=67391&col_no=925&dir=200704 [hereinafter National Working Group, 2007 Action Plan]. This need for a theoretical understanding (but for more specific areas, such as criminal and customs enforcement areas) was further acknowledged in the 2008 Action Plan, see National Working Group for IPR Protection, *China's Action Plan on IPR Protection 2008*, Mar. 18, 2008, pts.II.X(I)1, II.X(I)9, II.X(II)3, II.X(II)6, http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=197210&col_no=102&dir=200804 [hereinafter National Working Group, 2008 Action Plan].

drafted and are subject to wildly varying interpretations.⁴³ An understanding of the theory underlying the trademark laws will also assist Chinese policymakers with revising the Trademark Law and jurists with promulgation of judicial interpretations, as well as nationwide policies and educational programs for jurists will help curb haphazard application.⁴⁴ As a civil law system, China's jurists need a deep understanding of the theory underlying the principles of their trademark laws to interpret and apply them as uniformly as possible.⁴⁵ As these jurists currently lack such understanding and do not follow the process of *stare decisis*,⁴⁶ the application of the Trademark Law has appeared haphazard to the United States, and this has resulted in continuous tension and anger between the two countries.⁴⁷

III. FOUNDATIONS OF AMERICAN AND CHINESE TRADEMARK LAW

As previously stated, the main goal of this Article is to provide American policymakers with an understanding of Chinese trademark law in order to become more effective long-term influencers of change in China. Comparison of the theoretical and historical foundations of American and Chinese trademark law will aid in the comprehension of the modern-day status quo and will aid American policymakers in under-

43. See MERTHA, *supra* note 3, at 221.

44. An example of this haphazard application can be seen in trademark infringement cases where the Interpretations of the Supreme People's Court Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising From Trademarks (promulgated by the Supreme People's Ct., Oct. 12, 2002) LAWINFOCHINA (last visited Jan. 11, 2009) (P.R.C.) [hereinafter Supreme Ct. Interpretation]) has been applied. Examples can be found at <http://www.lawinfochina.com> (search "Civil Disputes Trademarks") (last visited Jan. 11, 2009) [hereinafter LAWINFOCHINA]. In *Toyota Motor Corp. v. Geely Group Corp.* (Beijing No. 2 Interim. People's Ct., Nov. 24, 2003), CHINA L. & PRAC., Dec. 2003, the Beijing No. 2 Intermediate People's Court held for the defendant based on an application of Article 10 of the Supreme Ct. Interpretation; *but see* *Starbucks Corp. v. Shanghai Starbucks Cafe Co.*, Shanghai No. 2 Interim. People's Court, Dec. 31, 2005, *upheld on appeal*, Shanghai Higher People's Ct., Dec. 20, 2006, *available at* LAWINFOCHINA. In that case, the Shanghai No. 2 Intermediate People's Court held for the plaintiff based on the same Article 10. To an outsider, the "Merry" mark and the "Shanghai Starbucks Café" mark both contain enough elements pursuant to Article 10 to warrant trademark infringement in both cases. While there could be other reasons for these varied in court decisions, to the U.S. observer, these differing results appear to be haphazard and without much logical basis.

45. The term "jurist" also refers to China's administrative agency officials, as China has a two-track enforcement mechanism that allows for trademark infringement cases to be heard by administrative agencies, rather than resorting to the more time-consuming and expensive court system. See XIAOWEN TIAN, *MANAGING INTERNATIONAL BUSINESS IN CHINA* 235 (2007).

46. See WEI LUO, *CHINESE LAW & LEGAL RESEARCH* 105 (2005); *see also* DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 212 (2003).

47. See *supra* notes 33, 36.

standing the differences and similarities between U.S. and Chinese trademark law.

A. Theoretical Foundations

There are several theories justifying intellectual property rights generally and in trademark law specifically,⁴⁸ including utilitarianism, Lockean, Hegelian, and social planning.⁴⁹ Respectively, the United States and China have adopted utilitarianism and social planning (whether explicitly or implicitly) as the theories underlying their trademark laws. As such, while the Lockean and Hegelian theories provide interesting counterpoints to the utilitarian and social planning theories, the following section will provide a brief overview of the two theories primarily used in the United States and China today.⁵⁰

1. Utilitarianism

Utilitarianism, as applied to intellectual property law, is an assessment of the consequences of maximizing the benefits to society as a whole, rather than prioritizing individual benefits.⁵¹ Specifically, as applied to trademark law, utilitarianism in American legal jurisprudence justifies legal protection because the protection of trademarks maximizes a benefit to society, namely, reduced search costs associated with the purchase of products.⁵² Such protection provides brand owners with in-

48. See generally William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001) (providing an overview of four theories of intellectual property) [hereinafter Fisher, *Theories*]; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (discussing labor and personality theories); Bone, *supra* note 24, at 2104–16 (describing the various theories that can underlie trademark protection).

49. Fisher, *Theories*, *supra* note 48, at 169–73. A Lockean theory of intellectual property rights premises protection on the natural right to the product of one's efforts. Locke's famous proviso states, "The Labour of one's Body, and the Work of his Hands, we may say, are properly his." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., 2d ed. 1967). An alternative to Lockean theory is Hegelian, which premises protection on the reasoning that "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self." See Hughes, *supra* note 48, at 330.

50. For in-depth discussions regarding the Lockean and Hegelian theories with respect to intellectual property generally, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) and Hughes, *supra* note 48.

51. See Amartya Sen & Bernard Williams, *Introduction to UTILITARIANISM AND BEYOND* 4 (Amartya Sen & Bernard Williams eds., 1982) ("Utilitarianism is thus a species of *welfarist consequentialism*—that particular form of it which requires simply *adding up* individual welfares or utilities to assess the consequences . . .") (emphasis in original); see also David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 8 (2004); Ramsey, *supra* note 24, at 215.

52. See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 623 (2005); William M. Landes & Richard A. Posner, *The Economics of Trademark Law*,

centives to improve the quality of their trademarked products.⁵³ A noted American economist theorized that without trademark protection, “[t]he result would be a race to produce inferior products, rather than competition to produce better ones.”⁵⁴ In addition, since there is “information capital embodied in a trademark,” trademark protection also provides incentives to owners to invest in their trademark not only by improving the quality of the underlying product but also in other ways, such as advertising.⁵⁵ Overprotection is balanced by taking into account the costs of trademark protection, such as enforcement costs (costs to society to enforce the protection of trademarks), transaction costs (higher prices for branded products), and barriers to entry (higher costs to enter an already-established market with branded products).⁵⁶

Utilitarianism has been firmly adopted in the United States as the theoretical justification for American trademark law.⁵⁷ American courts favor the objectivity of utilitarianism in order to balance the costs arising from trademark law with its benefits and arrive at an optimal level of protection.⁵⁸ While there are many criticisms of utilitarianism,⁵⁹ one

78 TRADEMARK REP. 267, 271 (“[A] trademark conveys information that allows the consumer to say to himself, ‘I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier.’”). See also S. REP. NO. 100-515, at 4 (1988), *reprinted in* 1988 U.S.C.A.N.N. 5577, 5580.

53. Robert E. Meiners & Robert J. Staaf, *Patents, Copyrights and Trademarks: Property or Monopoly?*, 13 HARV. J.L. & PUB. POL’Y 911, 931 (1990) (“A price premium over and above costs of production (including a normal profit) can create incentives for firms to produce high quality products. These price premiums represent the return to investment in brand-names or trademarks.”).

54. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:4 (4th ed. 2008) (citing to THE CRASWELL REPORT 7 (1979) (FTC Policy Planning Issues Paper: Trademarks, Consumer Information and Barriers to Competition, FRC Office of Policy Planning)).

55. Landes & Posner, *supra* note 52, at 271–72.

56. See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 173 (2003) (discussing premiums associated with brand products); Bone, *supra* note 24, at 2123 (discussing various enforcement costs). One of the costs not necessarily considered by jurists is the potential for “monopoly of words” or the curtailment of free speech. Professor Landes and Judge Posner make a case for the “monopoly of words” as a cost to protection of trademarks. See LANDES & POSNER, *supra*, at 169–72.

57. See sources cited *supra* note 24. Utilitarianism also provides the theoretical justification for American intellectual property laws in general.

58. See Fisher, *Theories*, *supra* note 48, at 170 (“Awareness of [the] benefits and harms should (and usually does) . . . guide legislators and judges when tuning trademark law; marks should be (and usually are) protected when they are socially beneficial and not when they are, on balance, deleterious.”)

59. See, e.g., Sen & Williams, *supra* note 51, at 5 (arguing that utilitarianism is a “drastic obliteration of usable information”); McGowan, *supra* note 51, at 9 (“It is hard to apply rule utilitarianism to practical problems.”); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 539 (1990) (“The normative use of economics in [intellectual property] suffers from, among other things, the problems inherent

benefit is the ability of the theory to objectively account for the costs and benefits associated with trademark protection and actively respond to that information, while maintaining sufficient incentives to maximize the societal benefit gained from trademarks. This objectivism is quite different from the more subjective analysis of social planning, as discussed *infra*.

2. Social Planning

a. Overview of the Social Planning Theory

The term “social planning theory” was coined by Professor William Fisher as a way to solidify various ideas proposing that intellectual property rights “can and should be shaped so as to help foster the achievement of a just and attractive culture.”⁶⁰ These various ideas include “Consumer Welfare”, “A Cornucopia of Information and Ideas”, a “Rich Artistic Tradition”, “Distributive Justice”, “Semiotic Democracy”, “Sociability” and “Respect.”⁶¹ Social planning theory primarily differs from utilitarianism “in its willingness to deploy visions of a desirable society richer than the conceptions of ‘social welfare’ deployed by utilitarians.”⁶²

Comparing trademarks to other types of intellectual property, social planning theory is not as widely applied to trademarks as it is to copyrights or patents.⁶³ One reason could be the commercial aspect of trademarks, which does not lend itself as easily to a dialogue of most of the social planning theory concepts. While trademarks have become important symbols in daily life, extending beyond the underlying

in defining and measuring society’s welfare.”). See generally Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM FOR AND AGAINST* 77 (1973).

60. Fisher, *Property & Contract*, *supra* note 20, at 1214–15.

61. *Id.* at 1216–18 (providing a brief explanation of each theory).

62. Fisher, *Theories*, *supra* note 48, at 172.

63. See generally Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717 (2007) (presenting an analysis of copyright and patent protection with a focus on distributional considerations); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345 (1995) (arguing that in a digital environment, social costs to dialogue and distributive choices should be considered when debating copyright principles and doctrines); William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1744 (1988) (formulating the fair use doctrine from the perspective of the “good life” and “good society” conceptualizations) [hereinafter, Fisher, *Fair Use*]; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993) (questioning the right of publicity due to the costs to society of “free expression and cultural pluralism”); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (reframing copyright protection from a “democratic paradigm” standpoint).

products,⁶⁴ there may still remain a bias towards viewing trademarks as having nothing more to add to society than mere symbols used to purchase products.

While several components of social planning theory have existed as long, or perhaps longer, than the other theories, as applied to intellectual property, it is acknowledged that social planning theory as a whole is less developed and less recognized.⁶⁵ There are at least two reasons for this. First, since defining the ideal uses of intellectual property in society is subjective, judicial decisions could vary radically based on an individual's subjective understanding of trademark law.⁶⁶ Second, social planning has overtones of paternalism, which may help to explain why U.S. courts have traditionally shied away from using such theory to promote intellectual property, preferring to rely on more objective theories, such as utilitarianism.⁶⁷ However, these two reasons may help explain why social planning theory has been adopted in China, as China's history is steeped in subjective governance and paternalism.⁶⁸

64. See Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 972–73 (1993) (“trademarks play a significant role in our public discourse”); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397 (1990) (“ideograms that once functioned solely as signals denoting the source, origin, and quality of goods, have become products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them”); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1727–28 (1999) (“Consumers have come to attach enormous value to trade symbols, and it is no longer uncommon to see the symbols valued far in excess of the worth of the underlying products they identify.”).

65. Fisher, *Theories*, *supra* note 48, at 173 (“[a]s yet, however, this fourth approach is less well established and recognized than the other three.”).

66. Fisher, *Property & Contract*, *supra* note 20, at 1215–16 (“[W]hat are the features of a just and attractive culture? The difficulty of answering that question is, I think, the principal reason the method has not gained more adherents . . .”).

67. *Id.*; *but cf.* MCCARTHY, *supra* note 54, § 1:18 (“Unfair competition law is probably unique in the sense that many judges are not reluctant to reveal that they do draw upon their own conceptions of ‘morality’ in deciding a close case. Judicial characterizations of commercial morality may assume picturesque qualities.”).

68. See WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 23–25 (Stan. Univ. Press 1995); *see also* HAROLD E. GORST, *CHINA* 136–49 (Sands & Co. 1899). *See generally* JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* (2d ed. 2005); CHANG-TU HU, *CHINA: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* (Hsiao Hsia ed., 1960). Localism, or subjective governance (meaning purposeful decentralization of the government in consideration of the vast differences in local conditions) was prevalent during the Imperial era, and although the Communist Party tried to centralize the government after 1949, localism was re-introduced in the reform era of the late 1970s. *See* MERTHA, *supra* note 3, at 26 (discussing the “fragmented authoritarianism” that increased during the reforms beginning in the late 1970s (citing Kenneth G. Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 8 (Kenneth G. Lieberthal & David M. Lampton eds., 1992))); Andrew Mertha, *Putting Your Mouth Where Your Money Is*, in CHINA'S FOREIGN TRADE POLICY: THE NEW CONSTITUENCIES 59, 64 (Ka Zeng ed., 2007) (discussing

The Chinese tradition of paternalism, augmented by the socialist ideals of the current Chinese government, has created an environment where the government is not averse to imposing its vision of a better Chinese society.⁶⁹ The two main goals of the Chinese theory of trademarks directly embody the concept of deploying a vision of the “desirable” Chinese society.⁷⁰

b. Consumer Welfare

Consumer welfare is defined both literally and figuratively.⁷¹ The literal meaning, concern for the health and safety of consumers, is apt with respect to trademarks, as “[t]rademarks fix responsibility.”⁷² The source identifier⁷³ provides a way to find the manufacturer of the product. If a product turns out to be defective and harmful to the health or safety of the consumer, the original manufacturer can be tracked down and held liable.⁷⁴ In essence, under this concept, manufacturers need to provide a level of quality in their products so as to not harm the consuming public.

Interestingly, this literal interpretation of consumer welfare appears very similar to the utilitarian concern about quality. Under the utilitarian

the lack of control the national government in Beijing has over the local governments with respect to threats of retaliation against foreign businesses who complain about a lack of effective intellectual property enforcement). However, localism is threatening to cause increased widespread differences in application of trademark laws in China. See Maskus, Dougherty & Mertha, *supra* note 27, at 309–10 (discussing the decentralized nature of the bureaucracies in charge of enforcing intellectual property rights).

69. As such, the downsides to social planning theory identified by Professor Fisher are not detracting factors from the Chinese perspective. See *supra* note 66 and accompanying text. The adoption of a social planning theory does not necessarily equate with a lack of compliance with TRIPS. However, there are certain provisions (or lack thereof) in the current laws that do not necessarily meet the TRIPS requirements. See *infra* Part V and the discussion therein.

70. Since the Chinese social planning theory is premised on consumer welfare and distributive theories, see *infra* Part IV.B., the former a traditional concept of trademarks and the latter a commercial utility view, this Article does not contend that the current Chinese theory is intended to foster anything but the health and safety of consumers, while at the same time redistributing the wealth gained through trademarks. While outside the scope of this Article, it would be interesting to analyze whether the other “social planning” goals identified by Professor Fisher could take root in China one day.

71. Professor Fisher describes consumer welfare with respect to intellectual property as a “guideline [that] urges us to select a combination of rules that will maximize consumer welfare by optimally balancing incentives for creativity with incentives for dissemination and use.” Fisher, *Theories*, *supra* note 48, at 192.

72. MCCARTHY, *supra* note 54, § 2:4; see also FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* 47 (1925).

73. The term “source identifier” is used to distinguish between the modern trademark (a type of property embodying the goodwill of the trademark) and the symbols used to identify the source of the product. See MCCARTHY, *supra* note 54, § 5:1 (the “prime function [source identifier] was to trace defective merchandise back to workman.”)

74. Thomas D. Drescher, *The Transformation and Evolution of Trademarks—From Signals to Symbols to Myth*, 82 TRADEMARK REP. 301, 319 (1992).

theory, without consistent quality, consumers are not in a position to purchase products by relying only on the trademark.⁷⁵

The difference between the two theories, vis à vis the consumer and quality, is in their applications. The American utilitarian notion of quality is tied to an economic efficiency concept, namely, that the product should be such a quality that the consumer will continue to pay for it.⁷⁶ This presents a problem for those consumers who may lack the ability to pay for products at a quality level that is safe. A utilitarian theory would allow the trademark owner to reduce quality in order to reduce prices, which would result in a race to the bottom that may harm consumers.⁷⁷ Since the Chinese notion of consumer welfare is tied to a more paternalistic concept, a level of quality in trademarked products that guarantees, at a minimum, that trademarked products are safe to consume, is naturally required. In effect, the trademark law is used as a type of product safety law, in addition to the other laws that currently legislate product quality and consumer protection.⁷⁸

c. Distributive Justice

In granting a trademark registration (or recognizing a right to a trademark),⁷⁹ the government provides the brand owner with exclusive

75. See LANDES & POSNER, *supra* note 56, at 168 (“When a brand’s quality is inconsistent, consumers learn that the trademark does not enable them to relate their past to their future consumption experience; the trademark does not reduce their search costs . . .”).

76. See MCCARTHY, *supra* note 54, § 2:4 (“[I]f there were no trademarks . . . a manufacturer would gain little or nothing from improving his product’s quality. Consumers would be unable to recognize high- or low-quality brands, so sales would tend to go to manufacturers who reduced their price by cutting corners on quality. The result would be a race to produce inferior products, rather than competition to produce better ones.”); see also Bone, *supra* note 24, at 2107.

77. See MCCARTHY, *supra* note 54, § 2:4. This is tempered in the United States with the application of consumer safety laws.

78. See Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 953 (2006) (“If the product copy is of inferior quality, selling it under a trade mark is an offense . . .”) (quoting Mary L. Riley, *Strategies for Enforcing Intellectual Property Rights in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 65 (Mary L. Riley ed., 1997)) [hereinafter Yu, *Pirates to Partners*]. Interestingly, commentators have long suggested that one way to enforce trademark rights in China (whether registered or not) is through a focus on quality concerns. A trademark owner can apply to either the Administration for Industry and Commerce or the Technical Supervision Bureau (the AIC’s authority comes from the Trademark Law or the Anti-Unfair Competition Law, the TSB under the Product Quality Law or the Consumer Protection Law) for enforcement of trademark rights disguised as quality-related problems that harm the health of consumers. *Id.* at 953–54 n.255. This alternate method of enforcement is akin to the suggestions made in Part V of this Article, arguing that one way to effectively persuade Chinese policymakers to revise the Trademark Law is by reframing the issues from a consumer welfare standpoint. See *infra* Part V.

79. There are two bases that give rise to a trademark right. One is the first-use right, which provides protection to the first user of a trademark. The second is registration, which

rights to that trademark.⁸⁰ A trademark grants its holder the right to exclude others from using a similar representation that would infringe upon that trademark.⁸¹ And in the case of new products where the trademark in effect provides the only method of description, the trademark owner has a type of “language monopoly” in describing the new product.⁸² With such “language monopoly” in describing the product, the first market entrant can discourage competition.⁸³ Today, trademarks are keys to economic success for products or services. A famous or well-known trademarked product or service can garner a significant premium over a more obscure product or service, even though they may be of the same quality.⁸⁴

Application of a redistributive theory of trademark law would continue to grant these rights but temper them to allow as much access as possible, while still maintaining the trademark.⁸⁵ In applying this theory in a trademark application, the scope of descriptiveness should be broad and, correspondingly, the scope of distinctiveness should be construed narrowly.⁸⁶ This may prevent a grant of exclusivity to marks for new products which have no way other than the trademark to describe them, by deeming the new mark as descriptive of the product, and thus allowing more access to other potential users. In addition, a narrow view of trademark infringement based on similarity would eliminate exclusivity to marks unless the allegedly infringing mark was virtually identical,

provides protection to the first applicant for a trademark (regardless of whether the trademark has been in use prior to applying for registration; however, in some jurisdictions, there may be requirements as to use within a certain time period of the initial application). The United States is a first-to-use system and China is a first-to-register system.

80. See, e.g., TRIPS, *supra* note 8, art. 16(1) (“The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.”).

81. *Id.*

82. LANDES & POSNER, *supra* note 56, at 172 (providing the examples of Kleenex, Xerox, and Aspirin).

83. See Fisher, *Theories*, *supra* note 48, at 170 (“[T]rademarks can sometimes be socially harmful—for example by enabling the first entrant into a market to discourage competition by appropriating for itself an especially attractive or informative brand name.”).

84. See Landes & Posner, *supra* note 52, at 278–79; Meiners & Staaf, *supra* note 53, at 931; see also *Playboy Enters., Inc. v. Baccarat Clothing Co.*, 692 F.2d 1272, 1275 (9th Cir. 1982).

85. Professor Fisher defines distributive justice as, “To the greatest extent practicable, all persons should have access to the informational and artistic resources [of art].” Fisher, *Property & Contract*, *supra* note 20, at 1217. Instead of providing access to “informational and artistic resources,” a redistributive trademark theory provides access to the goodwill built up in a trademark in order to redistribute the wealth created by it.

86. See, e.g., *Du Pont Cellophane Co. v. Waxed Prods. Co.*, 85 F.2d 75, 77–78 (2d Cir. 1936) (holding that the word “cellophane” was descriptive of the underlying product and as such, was a generic term for the product and not a trademark).

thus making trademarks available to more individuals. In contrast to utilitarianism, which is primarily concerned with protecting lowered search costs for consumers, a redistributive theory of trademark law extends the concern beyond the consumers; lowered search costs to the trademark owner, and even to other producers trying to enter the marketplace. According to Professor Margaret Chon, the “[intellectual property] balance question . . . [is] which social group (creators or users) is entitled to use of a particular type of social good (that is, an [intellectual property]-protected knowledge good).”⁸⁷

From an economic standpoint, intellectual property was positioned as a social good by China’s reform government of the 1970s.⁸⁸ As one of the keys to economic success, intellectual property protection was viewed as a building block to encourage foreign investment in China. This would allow for growth across all sectors,⁸⁹ a belief that persists to this day.⁹⁰ China’s response to the intellectual property balance question has been to allow greater access to users of intellectual property and through the trademark laws, provide access and availability to new market entrants (which may include infringers) to some of the economic value built by previous market entrants.⁹¹ Redistribution is supplemented (and balanced at times) by the consumer welfare goal, as is reflected through the text of the Trademark Law and the views of the policymakers.⁹²

B. Historical Foundations

The roots of both U.S. and Chinese trademark law appear similar from archaeological evidence, as both Roman bricks⁹³ and ancient Imperial-age Chinese pottery have been found with source identifiers.⁹⁴ Similarly, re-

87. Chon, *supra* note 22, at 808.

88. Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 190–91 (Daniel J. Gervais ed., Oxford Univ. Press 2007) [hereinafter Yu, *China Puzzle*].

89. *Id.* at 192.

90. See *Protection in China*, *supra* note 26.

91. See, e.g., *Toyota Motor Corp. v. Geely Group Corp.*, CHINA L. & PRAC., Dec. 2003 (Beijing No. 2 Interm. People’s Ct., Nov. 24, 2003), and text accompanying note 44.

92. See *infra* Part IV.B.

93. See Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADE-MARK REP. 265 (1975), reprinted in 73 TRADE-MARK REP. 222, 223–25 (1983).

94. See Abraham S. Greenberg, *The Ancient Lineage of Trade-Marks*, 33 J. PAT. & TRADE-MARK OFF. SOC’Y 876, 878 (1951) (“It is to the Chinese . . . that one must credit the first recorded marks of origin. The earliest evidence of the use of trade-marks is found on Chinese pottery of the period of the Chinese Emperor Hoang-To [2698 B.C.]”); Ke Shao, *Look at My Sign!—Trademarks in China from Antiquity to the Early Modern Times*, 87 J. PAT. & TRADE-MARK OFF. SOC’Y 654, 656–57 (2005) (“Various names of the individual commercial

cords reflect that misappropriation of source identifiers is not a new phenomenon for either country and can be traced far back in both their histories.⁹⁵ In both regions, protection for such misappropriation was granted to the original user; however, such protection was not necessarily widespread, nor was it accomplished through judicial channels.⁹⁶ European guilds and Chinese clans were generally responsible for policing the use of source identifiers and for taking action against misappropriators.⁹⁷ Beyond these superficial similarities, the histories of American and Chinese trademark law are extremely different. The following historical differences will provide insight into the evolution of the current theoretical underpinnings of the two countries: (1) the genesis of trademark law in each country; (2) the continuity of trademark law; and (3) the evolution of principles and goals of each country's trademark law.

1. Genesis of Trademark Law

U.S. trademark laws are organic to the United States: American individuals and businesses wanted and sought trademark protection.⁹⁸ In the United States, the earliest call for government legislation providing for trademark protection was a petition to the House of Representatives from Boston sail-cloth manufacturers in 1791.⁹⁹ The first federal trademark law was passed in 1870,¹⁰⁰ and, with a few twists and turns,¹⁰¹ culminated in

producers were found to be marked on a significant amount of potteries excavated from ten tombs of the Warring States Period (403–221 B.C.) in Hebei province in 1956.”).

95. See ALFORD, *supra* note 68, at 16 (describing counterfeiting during the Northern Song dynasty, 960–1127 A.D. in China); Diamond, *supra* note 93, at 236 (citing examples from the thirteenth through sixteenth centuries in Europe).

96. See WILLIAM T. ROWE, HANKOW: COMMERCE AND SOCIETY IN A CHINESE CITY, 1796–1889 at 328–29, 334–40 (Stanford Univ. Press 1984) (discussing guild functions in China).

97. See *id.*; Edward S. Rogers, *Some Historical Matter Concerning Trade-Marks*, 9 MICH. L. REV. 29 (1910), reprinted in 62 TRADEMARK REP. 239, 246–47 (1972) (discussing the guild regulations in Milan and Parma).

98. While the early history of trademarks (as source identifiers) traces back to Roman times and the common law of trademarks is imported from England, see *supra* notes 93, 95, 97, statutory protection of trademarks originated from the desire of U.S. businesses.

99. Rogers, *supra* note 97, at 251–52 (citing JEFFERSON'S COMPLETE WORKS, Vol. 7, 563 (1854)). See also SCHECHTER, *supra* note 72, at 130–33; Benjamin G. Paster, *Trade-marks—Their Early History*, 59 TRADEMARK REP. 551, 566–67 (1969). Rather than federal action, trademark law first developed at the state level. See MCCARTHY, *supra* note 54, § 5:3.

100. An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights, Act of July 8, 1870, ch. 230, 16 Stat. 198.

101. The 1870 law was declared unconstitutional by the United States Supreme Court in *The Trade-Mark Cases*, 100 U.S. 82, 99 (1879). The authority for the 1870 law had been based on the patent and copyright clause of the Constitution, which was found unconstitutional. The Supreme Court held that Congress had inappropriately clumped the power to regulate trademarks in with the power to regulate patents and copyright. As Justice Miller stated in the Court's opinion, “Any attempt . . . to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of

the Lanham Act in 1946, which remains the basis for federal trademark protection today.¹⁰² In contrast, the first official Chinese trademark legislation (enacted in 1923) was the result of China's concessions in the treaties of 1903 and 1904 after losing in the Boxer Uprising.¹⁰³ However, the passage of this law did not provide real improvement in trademark protection.¹⁰⁴ With the victory by the Communist party in 1949, trademark protection became minimal and was eventually repealed altogether.¹⁰⁵ It was not until the late 1970s that protection for trademarks was re-established, due in part to American influences. The United States entered into the 1979 Agreement on Trade Relations with China,¹⁰⁶ leading to China's enactment of the 1982 Trademark Law. The subsequent revisions to China's statutory and intellectual property framework are due in large part to American activism in China since the 1980s.¹⁰⁷

2. Continuity of History

While American trademark legal history can be viewed as an unbroken chain, the history of Chinese trademark law is more disjointed. As a common law system derived from England, the history of U.S. trademark law stretches back to the late sixteenth century, when the first judicial case granted a right of action based on mark misappropriation.¹⁰⁸

authors, will show that the effort is surrounded with insurmountable difficulties." *Id.* at 93-94. Congress enacted a new law in 1881 (Act of Mar. 3, 1881, ch. 138, 21 Stat. 502), which was overhauled in 1905 (Act of Feb. 20, 1905, ch. 592, 33 Stat. 724). Throughout the ups and downs of the federal legislation, the common law continued to provide protection. *See* MCCARTHY, *supra* note 54, § 5:2 ("By the 1850s, common law rules against . . . trademark infringement were well accepted.").

102. Act of July 5, 1946, ch. 540, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051-1141).

103. *See* Yu, *Sweet and Sour*, *supra* note 34, at 3 n.25.

104. *See* Charles Baum, *Trade Sanctions and the Rule of Law: Lessons from China*, 1 STAN. J. E. ASIAN AFF. 46, 52 (2001).

105. After the Communist party took control in October 1949 and created the People's Republic of China, all of the laws passed under the Republican government prior to 1949 were repealed. However, these laws continued in effect in the Republic of China based on Taiwan (including the 1923 trademark law). The Communist government initially provided for a type of protection for re-registered trademarks in the 1950s and 1960s, but very few trademarks were actually re-registered. Charles D. Paglee, *Chinese Trademark Law Revised: New Regulations Protect Well-Known Trademarks*, 5 U. BALT. INTELL. PROP. L.J. 37, 38-40 (1997).

106. Agreement on Trade Relations, U.S.-P.R.C., July 7, 1979, 31 U.S.T. 4651.

107. *See supra* note 19 and accompanying text. Prior to the early 1990s, China lacked the legal framework to adequately handle intellectual property protection. *See* ALFORD, *supra* note 68, at 67.

108. Keith M. Stolte, *How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter's Conundrum*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 505, 506 n.2 (1998) (citing to Sandforth's Case, Cory's Entries, BL MS. Hargrave 123, fo. 168 (1584), reprinted in J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY—PRIVATE LAW TO 1750 at 615-18 (1986)). Prior to the discovery by Professor J.H. Baker in 1979 of *Sandforth's Case*, Southern v. How, Popham's Reports 143 (1618), 79 Eng. Rep. 1243 (K.B.),

Sixteenth century misappropriation cases have continued to serve as foundations for modern trademark infringement cases.¹⁰⁹ While the federal statutory history of trademark law in the United States has not always been consistent (such as the Supreme Court declaring the first trademark law unconstitutional¹¹⁰), there has never been a total elimination of trademark protection like in China.

Although China passed its first trademark law in 1923¹¹¹ during the Great Proletarian Cultural Revolution (1966–1976), all notions of trademarks, even as source identifiers, were eliminated.¹¹² A popular saying in China during the Cultural Revolution highlights the prevailing sentiment: “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?”¹¹³ Trademark protections were not reinstituted until the reform government of Deng Xiaoping in the late 1970s, and the current Trade-mark Law was not passed until 1982.

was considered to be the first English trademark case. See Stolte, *supra*, at 509, 528. But see SCHECHTER, *supra* note 72, at 6–12 (in tracing the history of American trademark law, he argues that *Southern v. How*, an English case from 1618, should not be considered to be the origin of American trademark law). American trademark cases explicitly base their precedents on English jurisprudence. See, e.g., *Saxlehner v. Siegel-Cooper Co.*, 179 U.S. 42, 43 (1900), which explicitly adopts as controlling precedent an English case, *Millington v. Fox*, 3 Myl. & Cr. 338, 40 Eng. Rep. 956 (1838).

109. *Blanchard v. Hill*, 2 Atk. 484, 26 Eng. Rep. 692 (1742), was the first English case to cite *Southern v. How*, 79 Eng. Rep. 1243. However, the use of *Southern v. How* by the plaintiff’s attorney in this case was not helpful to the plaintiff, as the court still decided against granting an injunction against the defendant. Trademark cases became more numerous during the nineteenth century. *Millington v. Fox*, 3 Myl. & Cr. 338, 40 Eng. Rep. 956 (1838) was the first case that provided “adequate relief against infringement”. See Rogers, *supra* note 97, at 251; see also SCHECHTER, *supra* note 72, at 134; Stolte, *supra* note 108, at 517–18.

110. See *supra* note 101 and accompanying text.

111. Yexuan Yang, *Keeping a Check on Trademarks in China*, MANAGING INTELLECTUAL PROPERTY, Jan. 1, 2005, available at <http://www.managingip.com/Article.aspx?ArticleID=1321544>; see also *Ownership with Chinese Characteristics: Private Property Rights and Land Reform in the PRC: Roundtable Before the Cong.-Exec. Commission on China*, 108th Cong. 2 (2003) (statement of Mark A. Cohen, Attorney-Advisor, U.S. P.T.O.), available at <http://www.cecc.gov/pages/roundtables/020303/cohen.pdf>.

112. See Paglee, *supra* note 105, at 39 (stating that only foreign marks used in China and Chinese marks on exports received protection).

113. Bryan Bachner, *Back to the Future: Intellectual Property Rights and the Modernization of Traditional Chinese Medicine*, in *NEW FRONTIERS OF INTELLECTUAL PROPERTY LAW* 1, 11 (Christopher Heath & Anselm Kamperman Sanders eds., 2005). During the Cultural Revolution, products were sold under generic labels such as “Red Flag,” “East Wind,” and “Worker-Peasant-Soldier.” Mark Sidel, *Copyright, Trademark and Patent Law in the People’s Republic of China*, 21 TEX. INT’L L.J. 259, 272 (1986). From an outsider’s perspective, the result was “that quality varied widely, massive unauthorized copying occurred and consumer confusion was rampant.” *Id.*

3. Principles and Goals

During the European medieval period, guilds began to require their members to develop singular personal identification marks and use such marks alongside the guild mark.¹¹⁴ This development of the personal mark appears to have been the genesis of the optional, individual, property-rights concept in the U.S. tradition.¹¹⁵ Protection in the early days of the United States was sought through the court system, which provided recourse against trademark infringers based on theories of fraud upon the plaintiff.¹¹⁶ Courts saw the provision of this protection as being in the public interest, as well as in the interest of the trademark owner.¹¹⁷ The traditional principle of source identifiers as a liability evolved into viewing a trademark as an asset,¹¹⁸ a type of individual property meriting exclusivity and protection from misappropriators. The goal of American trademark law was (and still is) the protection of such assets, but only insofar as consumers warrant the protection.¹¹⁹

114. SCHECHTER, *supra* note 72, at 38, 44; Rogers, *supra* note 97, at 244.

115. See SCHECHTER, *supra* note 72, at 47.

116. For one of the earliest U.S. trademark cases, see *Thomson v. Winchester*, 36 Mass. 214 (1837). Chief Justice Shaw stated:

The Court are of opinion, that if the defendant made and sold medicines, calling them "Thomsonian Medicines," and sold them, or placed them in the hands of others to sell, as and for the medicines made and prepared by the plaintiff, so that persons purchasing the same supposed and believed that they were purchasing the medicines made and prepared by the plaintiff, it was a fraud upon the plaintiff, and an injury to his rights, for which the law will presume some damage.

Id. at 216.

117. See *Amoskeag Mfg. Co. v. D. Trainer & Sons*, 101 U.S. 51, 55, 62 (1879). In his dissenting opinion, Justice Clifford stated:

[I]t is equally true that the owners of such trade-marks are entitled to the protection of a court of equity in the exclusive use of the symbols they have thus adopted and affixed to their goods, the foundation of the rule being that the public interest as well as the interest of the owner of the trade-mark requires that protection.

Id. at 62.

118. SCHECHTER, *supra* note 72, at 47 ("In the course of time in certain trades, these police marks or liability marks gradually became . . . asset marks,—that is to say, they became valuable symbols of goodwill.").

119. See, e.g., *McLean v. Fleming*, 96 U.S. 245, 255 (1878) (finding of trademark infringement by McLean based on the mark creating a "false impression" in the mind of the consumer, since if the consumer is able to "discriminate the one from the other" after an "ordinary" inspection, then there is no infringement). As such, the right to exclude another in using a trademark actually stems from the consumer's perception of the trademark. See MCCARTHY, *supra* note 54, § 2:14. This consumer confusion test is the same one which continues to be applied today. See Lanham Trademark Act of 1946 § 32(1)(a), 15 U.S.C. § 1114(1)(a) (2006):

(1) Any person who shall, without the consent of the registrant—(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered

In contrast, the traditional concept of source identifiers as a way to fix liability and guarantee quality was carried into the Chinese trademark laws promulgated in the twentieth century. In 1963, the Regulations Governing the Control of Trademarks was promulgated by the State Council which declared that its purpose was to guarantee the quality of products.¹²⁰ The 1982 Trademark Law, seen as a break with old concepts of trademarks,¹²¹ stated, “Any user of a trademark shall be responsible for the quality of the goods in respect of which the trademark is used.”¹²² This quality requirement fulfilled the need to protect the health and safety of consumers in an environment that traditionally did not have strong consumer protection laws.¹²³

In addition, it was not until recently that it was possible to conceive of trademarks as a type of property right, from either the consumer’s point of view or that of the trademark user.¹²⁴ As such, the concept of trademarks as a type of asset (as embodied by the goodwill of the trademark) never took root in China. It was not until the reform government of the 1980s that trademarks began to be perceived as a means to improve the economy. After the Cultural Revolution, the reform government under the reign of Deng Xiaoping reinstituted the pre-Cultural Revolution trademark law regime in the hopes that China could

mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which *such use is likely to cause confusion, or to cause mistake, or to deceive*.

Id. (emphasis added).

120. Shangbiao guanli tiaoli, art. 3 [Regulations Governing the Control of Trademarks] (promulgated by the State Council, Apr. 10, 1963), *available at* http://www.lawyee.net/Act/Act_Display.asp?ChannelID=1010100&RID=83990&KeyWord= (in Chinese only) (“Trademarks represent the quality of commodities.”).

121. See ALFORD, *supra* note 68, at 74 (“[T]he Trademark Law of 1982 was widely heralded by both Chinese and foreign observers as representing a clean break from previous efforts to regulate [trademarks].”).

122. Trademark Law, *supra* note 7, art. VI (1982 version). This is now embodied in the current Trademark Law at Article VII.

123. ALFORD, *supra* note 68, at 63, 75. Although the concern for health and safety was encouraged by the Communist government (see Yu, *Pirates to Partners*, *supra* note 78, at 953), the reality was a lack of effectiveness, which remains the case today. See, e.g., WAYNE M. MORRISON, CHINA-U.S. TRADE ISSUES 9–10 (Cong. Research Serv., CRS Report for Congress Order Code RL 33536, July 11, 2007), *available at* <http://www.fas.org/srgp/crs/row/RL33536.pdf>; Nicolas Zamiska, Jason Leow, & Shai Oster, *China Confronts Crisis Over Food Safety*, WALL ST. J., May 30, 2007, at A3.

124. Until 2004, there was no legal protection for an individual’s right to own property. The Chinese Constitution was amended in 2004 to provide for individual property rights, and the first property law was enacted in 2006. See *infra* note 172. However, some scholars argue that a concept of individual property was embodied in pre-modern China source identifiers. See Shao, *supra* note 94, at 658, 662–65, 678 (discussing the various codes, policies and archaeological evidence to argue that the concept of rights was embodied in the source identifiers used during pre-modern China).

catch up economically and industrially to Western nations through Western investment in China.¹²⁵ The reform government recognized that, at the very least, providing an outward appearance of protection of intellectual property rights in China would encourage foreign investment of technology in the country.¹²⁶ With such growth, it was believed that the resulting wealth could then be redistributed in order to alleviate the widespread poverty,¹²⁷ while protecting the health and safety of consumers. While the 1982 Trademark Law was passed partly as a result of American influences, the goals of the law remained Chinese. The 1982 Trademark Law embodied the goals of consumer protection and redistribution.

These three differences between the American and Chinese trademark legal histories are crucial to a complete understanding of the current system in China. Whereas the Lanham Act was the culmination of an organic movement for trademark protection,¹²⁸ the growth of Chinese trademark law failed to develop past medieval clan protection until American influ-

125. See Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 27 (2001).

126. See Yu, *China Puzzle*, *supra* note 88, at 191–92; see also PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE I* (Routledge 2001) (discussing the link seen by China between legal reforms and economic development).

127. LO, *supra* note 25, at 29.

128. Since the passage of the Lanham Act, American individuals and businesses have pushed for expanded trademark protection, even going beyond the traditional utilitarian theory of American trademark law. The most recent pressure for expanded protection culminated in the passage of the Federal Trademark Dilution Act in 1995. With the subsequent passage of the Trademark Dilution Revision Act in 2006, the traditional theory of trademarks as protecting consumers' search costs has been pushed to its outer limits. Dilution is a cause of action that can technically provide a trademark owner with complete exclusivity over her trademark, without looking to consumer perception. The TDRA provides that the owner of a famous and distinctive mark is entitled to protection from dilution caused by another's use of such mark, "regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury." 15 U.S.C. § 1125(c)(1) (2007). For a further discussion of dilution, see generally Robert Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 550 (2006); Mary LaFrance, *No Reason to Live: Dilution Laws as Unconstitutional Restrictions on Commercial Speech*, 58 S.C. L. REV. 709 (2007); Graeme B. Dinwoodie & Mark D. Janis, *Dilution's (Still) Uncertain Future*, 105 MICH. L. REV. FIRST IMPRESSIONS 98 (2006), available at <http://students.law.umich.edu/mlr/firstimpressions/vol105/dinwoodie.pdf>; Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 756 (2003). While exceptions exist, such as fair use, see 15 U.S.C. § 1125(c)(3), concerns remain that dilution may create a chilling effect. Lisa P. Ramsey, *First Amendment Limitations on Trademark Rights*, in 3 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 147, 153 (Peter K. Yu ed., 2007) (arguing that dilution may "unconstitutionally suppress and chill commercial speech protected by the First Amendment."). As trademark owners can effectively corner a segment of the English language with their trademarks, developments in dilution have implications in the First Amendment area. See generally *id.*, at 160–61.

ences forced further growth of such laws in China.¹²⁹ The lack of a popular, organic Chinese movement for trademark laws has theoretically effected the current system. Without an organic movement, Chinese policymakers' efforts to introduce external intellectual property rights into the Chinese legal system have faced a steep implementation curve. In addition, the elimination of trademarks during Mao-era China curtailed a natural evolution of trademark theory. A great many of China's current legal scholars, jurists, and practitioners were raised during the Cultural Revolution, and as such, their experience of modern trademark law literally began with the 1982 Trademark Law. As China has raced (under pressure) to catch up to the rest of the world, its legal profession has focused on the drafting and revising of trademark legislation over the past two decades.¹³⁰ With such focus on legislation, there has been little time or interest for Chinese scholars, jurists, or practitioners to consciously reflect on the various theories that may underlie trademark law and adopt any one particular theory. Thus, the twin goals of consumer welfare and economic growth (on both macro and micro levels) have been an outgrowth of the historical and philosophical notions of trademark laws, and are reflected in the text and interpretation of the current law.

IV. ADOPTION OF THEORY: LANHAM ACT V. CHINESE TRADEMARK LAW

Although no single theoretical justification for trademark law necessarily precludes another, and while some theories can coexist, this Article chooses to focus on the most influential theoretical justifications that underlie trademark laws in the United States and in China. These primary justifications will be discussed through a textual and comparative analysis of the relevant laws, with an examination of the intent of each law as found in the text of the original legislation.¹³¹ This Article

129. See *supra* note 6 and accompanying text.

130. See Maskus, Dougherty & Mertha, *supra* note 27, at 311.

131. This Article will follow the general principle that the intent of the law should be interpreted through the unambiguous plain language of the law. See, e.g., Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (in interpreting a treaty, "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); see also *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text."); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000) ("Statutory interpretation begins with the plain meaning of the statute's language.").

will then consider relevant legislative history in which the original drafters or legislators may have stated their purposes in enacting such laws.¹³² Lastly, in order to demonstrate that these theories have remained the same over time, this Article considers the text and legislative history (if any) of significant amendments, as well as current case law and judicial statements of the application and purposes of such laws.¹³³

A. *The American Theoretical Justification*

Traditionally, the theoretical justification of U.S. trademark protection in the Lanham Act and the common law has been utilitarianism.¹³⁴ However, some scholars have argued that other theories justify recent court decisions and legislative actions, which are being used to expand trademark protection.¹³⁵ However, these are new developments, and there is insufficient evidence that the utilitarian theory of American trademark law has changed.

The Lanham Act codified common law trademark protection; it was not an enactment of radical legislation.¹³⁶ The explicit utilitarian intent of the Lanham Act is found in Section 45, which has never been amended:

132. Both the Lanham Act and the Chinese Trademark Law will be analyzed to provide a juxtaposition to highlight the differences between the two laws, and the legislative and judicial processes of the two countries.

133. While there is a difference between legislative intent and abstract theoretical principles, it can be a fine distinction. In the case of the Lanham Act, the legislative intent mirrors the principles of American utilitarianism in trademark law, as the Lanham Act merely codified the common law and its underlying theory. In the case of the Chinese Trademark Law, the opposite is true, as the theoretical principles of welfare (consumer and distributional) were used unconsciously as reasons to adopt the law.

134. See, e.g., MERGES, MENELL & LEMLEY, *supra* note 24, at 10 (“Utilitarian theory, and the economic framework built upon it, has long provided the dominant paradigm for analyzing and justifying the various forms of intellectual property protection.”); Benkler, *supra* note 24, at 59–60 (“[T]he basic ideological commitment of American intellectual property is actually heavily utilitarian, not Lockean or Hegelian. The Supreme Court has held consistently and unanimously that American law explicitly treats intellectual property rights in utilitarian terms, as limited monopolies granted to the extent necessary to create incentives for production.”); see also, Bone, *supra* note 24, at 2105–08; Ramsey, *supra* note 24, at 194, 249.

135. For example, the passage of the Federal Trademark Dilution Act (superseded by the Trademark Dilution Revision Act in 2006) has been seen as an expansion of trademark law protection. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1995), superseded by Pub. L. No. 109-312, § 2, 120 Stat. 1730 (2006) (codified as amended at 15 U.S.C. § 1125(c)). Compare Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 439–40 (1999) (arguing that the propertization of trademarks accounts for this expansion), with Bone, *supra* note 24, at 2122–23 (positing that enforcement costs are an alternative explanation for some of the expansive trademark doctrines); see also MERGES, MENELL, LEMLEY, *supra* note 24, at 618 (noting that, since the codification of trademark law in the U.S., trademark protection has been on an expansive track).

136. S. REP. NO. 79-1333, at 1 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274, 1274 (“The purpose of this bill is to place all matters relating to trade-marks in one statute and to eliminate judicial obscurity, to simplify registration and to make it stronger and more liberal,

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.¹³⁷

The first and fourth phrases in this paragraph, “making actionable the deceptive and misleading use of marks in such commerce,” and “to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks,” embody the principal utilitarian goal behind U.S. trademark law; namely, to protect against consumer confusion that would erode the lowered search costs that trademarks bring.¹³⁸ Evidence of this intent to carry over the utilitarian justifications from the common law is found in the legislative history of the Lanham Act, which states repeatedly, “One [goal] is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get.”¹³⁹

The second phrase of the Act, “to protect registered marks used in such commerce from interference by State, or territorial legislation,” acknowledges that a trademark is an exclusive right, which cannot be

to dispense with mere technical prohibitions and arbitrary provisions, to make procedure simple, and relief against infringement prompt and effective.”). See *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 861 n.2 (1982) (White, J., concurring) (citing S. REP. NO. 79-1333 (1946) (noting that “the purpose of the Lanham Act was to codify and unify the common law of unfair competition and trademark protection”)).

137. 15 U.S.C. § 1127 (2007). Congress had a dual purpose in stating its intent. The first was to explain the theory underlying the law. The second was to explicitly cite the authority that gave Congress the power to enact the Lanham Act, which is the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3).

138. See Stephen L. Carter, *The Trouble With Trademark*, 99 YALE L.J. 750, 762 (1990); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 466–67 (2005); Nicholas Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 526 (1988); Landes & Posner, *supra* note 52, at 271; Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690 (1999); Lunney, *supra* note 135, at 421, 432; I.P.L. Png & David Reitman, *Why Are Some Products Branded and Others Not?*, 38 J.L. & ECON. 207, 208–11 (1995).

139. See S. REP. NO. 79-1333, at 1 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274, 1274.

violated by the States.¹⁴⁰ This purpose is further reflected in Section 40 of the Lanham Act, which holds the U.S. federal government (including “agencies and instrumentalities thereof”) and individual States liable for infringement in certain cases.¹⁴¹ While Congress may have overstepped its constitutional authority, this explicit acknowledgement (even if unenforceable at times¹⁴²) of an individual’s right in her trademark is noticeably absent from the Chinese Trademark Law.

The third phrase of the Act, “to protect persons engaged in such commerce against unfair competition,” embodies the second utilitarian goal of trademark law, which is to protect an owner’s investment in her mark and in so doing, provide incentives for continued quality control.¹⁴³ As the Senate Committee on Patents report states, “where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner.”¹⁴⁴ American jurisprudence acknowledges that the owner of a trademark needs to substantially invest in her trademark in order to gain traction with the consuming public.¹⁴⁵ Out of this investment comes goodwill, which is the intangible property that the owner’s trademark symbolizes.¹⁴⁶ In order to be able to provide

140. See MCCARTHY, *supra* note 54, § 2:10. However, it is questionable whether a lawsuit against a State or the U.S. federal government could actually be brought pursuant to the Lanham Act. See generally Jason Karasik, Note, *Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act*, 27 HASTINGS COMM. & ENT. L.J. 475 (2005); Bruce E. O’Connor & Emily C. Peyser, *Ex Parte Young: A Mechanism for Enforcing Federal Intellectual Property Rights Against States*, 10 B.U. J. SCI. & TECH. L. 225 (2004).

141. 15 U.S.C. § 1122 (a)–(b). *But see* College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd., 527 U.S. 666 (1999) (holding the abrogation of state immunity under the Trademark Remedy Clarification Act outside of Congress’ authority).

142. There have been Congressional attempts to rewrite these provisions so as to validly exercise its authority to abrogate State and federal immunity. The most recent example has been the Intellectual Property Protection Restoration Act of 2003 (H.R. 2344 and S. 1191, 108th Cong. (2003)).

143. LANDES & POSNER, *supra* note 56, at 203–04 (“[I]f stripped of trademark protection, A would have less incentive either to develop a strong trademark or to produce a high-quality good.”); Dogan & Lemley, *supra* note 138, at 466 (without trademark protection, firms would be disincentivized to invest in the quality and goodwill of their products and services).

144. S. REP. NO. 79-1333, at 1 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274, 1274.

145. See, e.g., Chemical Corp. of Am. v. Anheuser-Busch, Inc., 306 F.2d 433, 434 (5th Cir. 1962) (Plaintiff had spent over \$40 million in advertising its products and slogans. “Plaintiff advertised Budweiser beer with the slogans and trademarks on radio stations, television, national billboards, newspapers and national circulated magazines. The evidence shows that plaintiff’s sales have increased since 1956 and a great portion of the increase is attributable to the success of plaintiff’s advertising.”).

146. See McLean v. Fleming, 96 U.S. 245, 254 (1878) (“[A] trade-mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells to distinguish the same from

the benefits of reduced search costs for consumers that an established trademark provides, it is assumed that brand owners need incentives to keep the quality of their underlying product and service consistent.¹⁴⁷ Such incentives are provided through the protection by trademark law of the owner's goodwill that she builds into her trademark through consistent quality and advertising.

More recently, the utilitarian justification for the Lanham Act was affirmed in the Report of the Senate Committee on the Judiciary for the Trademark Law Revision Act of 1988, in which it was stated that part of the purpose of the act was "to improve the law's protection of the public from counterfeiting, confusion and deception."¹⁴⁸ In addition, the report goes on to recite the dual purposes of the Lanham Act:

Trademark law protects the public by making consumers confident that they can identify brands they prefer and can purchase those brands without being confused or misled. Trademark laws also protects [sic] trademark owners. When the owner of a trademark has spent considerable time and money bringing a product to the marketplace, trademark law protects the producer from pirates and counterfeiters.¹⁴⁹

While the Federal Trademark Dilution Act of 1996 and other more recent doctrinal developments provide some support that the consumer-focused utilitarianism is moving toward a more property-based theory,¹⁵⁰ it does not appear that dilution is gaining much momentum in the courts.¹⁵¹ Recent case law demonstrates continued entrenchment of utili-

those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."); *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) ("A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his."); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98 (1918) ("[A] trade-mark confers no monopoly whatever in the proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.").

147. See LANDES & POSNER, *supra* note 56, at 173 ("trademark law induces its owner to invest in maintaining uniform product quality").

148. S. REP. NO. 100-515, at 1 (1988), as reprinted in 1988 U.S.C.A.N.N. 5577, 5577.

149. *Id.* at 4, 1988 U.S.C.A.N.N. at 5580.

150. But see Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1840 (2007) (arguing that the traditional basis for trademark protection was founded on an intention to protect property interests of producers against unfair competition by direct competitors).

151. As an example, only 186 trademark infringement cases have been decided since 1996 where the Federal Trademark Dilution Act or the Trademark Dilution Revision Act was discussed. Of these cases, only 57 were decided since the Trademark Dilution Revision Act was passed on October 6, 2006. These numbers are based on the author's search of www.lexis.com of the "U.S. combined federal case law" file on February 10, 2009 using "di-

tarianism in the United States.¹⁵² As Judge Posner stated in *Ty Inc. v. Perryman*, “The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods.”¹⁵³ And in *Qualitex Co. v. Jacobson Co.*, the Supreme Court, citing Professor McCarthy’s treatise, stated, “In principle, trademark law, by preventing others from copying a source-identifying mark, ‘reduce[s] the customer’s costs of shopping and making purchasing decisions’”¹⁵⁴ Although there may be other theories that threaten to become the primary justification for U.S. trademark law, such theories do not appear to have gained widespread acceptance.

B. *The Chinese Theoretical Justification*

In stark contrast to American trademark law, the Chinese Trademark Law lacks any acknowledgement or debate of any theoretical justification. The 2007 Intellectual Property Rights Action Plan states that one of China’s objectives is “[t]o strengthen the study on criminal, civil, administrative and judicial protection of [intellectual property rights], and try to produce theoretical outcomes, thus providing a theoretical basis for

lution” and “FTDA” or “TDRA” as search parameters and did not weed out appealed cases or cases that actually used the FTDA or TDRA as a basis for recovery.

152. See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (“Federal trademark law ‘has no necessary relation to invention or discovery,’ but rather, by preventing competitors from copying ‘a source-identifying mark,’ ‘reduce[s] the customer’s costs of shopping and making purchasing decisions,’ and ‘helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product’” (citations omitted)); *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 460 (5th Cir. 2003) (a trademark “aids consumers by assuring them that products with the same trademark come from the same source”); *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 696 (6th Cir. 2003) (“The ultimate issue in this case, however, is not defendants’ intent, but whether the presence of [plaintiff’s trademark] in the URL post-domain path for [defendant’s] web page is likely to cause confusion among consumers regarding the origin of the [plaintiff’s] product.”); *Sunrise Jewelry Mfg. Corp. v. Fred S.A.*, 175 F.3d 1322, 1325 (Fed. Cir. 1999) (“The Lanham Act provides national protection of trademarks in order for owners of marks to secure the goodwill of their businesses and in order to protect the ability of consumers to distinguish among competing producers.” (citation omitted)); *EMI Catalogue P’ship v. Hill, Holiday, Connors, Cosmospulos Inc.*, 2000 U.S. App. LEXIS 30761, *13 (2d Cir. Sept. 15, 2000) (stating that trademarks “enable consumers to recognize and repurchase goods with which they have previously been satisfied.”). See also *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (Note that while the Supreme Court upholds the traditional utilitarian view that “[trademark] law broadly prohibits uses of trademarks, trade names, and trade dress that are likely to cause confusion about the source of a product or service[.]” *Moseley* itself is about a more recent expansion of trademark doctrine, namely dilution.).

153. *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002), *cert. denied*, 538 U.S. 971 (2003).

154. *Qualitex Co. v. Jacobson Co.*, 514 U.S. 159, 163–64 (1995).

revising and improving [intellectual property rights]-related laws.”¹⁵⁵ As discussed in Part III.B., *supra*, one of the reasons for this lack of self-awareness is that the Chinese trademark system has been implemented into the Chinese legal system by foreigners.¹⁵⁶ Without a strong organic legal tradition for such protection, China has been focusing primarily on drafting and revising its trademark laws. However, with the pending revisions to the Trademark Law, a change in focus is urgently needed. Without a better understanding of the current theoretical underpinnings of the Trademark Law, future application of the revised Trademark Law may continue to appear haphazard to foreigners, most especially the American government and businesses,¹⁵⁷ which is likely to lead to continued conflict between the United States and China.¹⁵⁸

To complicate matters, any theoretical analysis is hampered by the lack of publicly available information.¹⁵⁹ In China, there is no recorded legislative history similar to that in the United States. In contrast to the Congressional Record, where statements made on the floors of the House and Senate are in the public record, no such records are available in China. In addition, legislative activity is quite complicated in China, with several different governmental organs possessing the ability to pass nationally-binding legislation.¹⁶⁰ Furthermore, legislation that is passed reflects a behind-the-scenes consensus building, meaning that if a particular law is strongly opposed by powerful governmental organs, it is likely that the introduction of such law will be deferred until a consensus of the government can be reached. A recent example of this process is the Property Law, which was ready for enactment in 2006 but was deferred

155. National Working Group, *2007 Action Plan*, *supra* note 42, pt.II.X.(III)(1). *See also* National Working Group, *2008 Action Plan*, *supra* note 42.

156. *See* ALFORD, *supra* note 68, at 33. While the Chinese government (led by Deng Xiaoping) positioned intellectual property rights as a necessary item for the development of the Chinese economy (*see* Yu, *China Puzzle*, *supra* note 88, at 190–91), subsequent changes to the Trademark Law (and other intellectual property laws) have been U.S.-driven. *See* MERTHA, *supra* note 3, at 35–76 (describing the U.S. pressure and the legislative changes that resulted from such pressure).

157. As discussed, application of the Trademark Law by Chinese jurists appears haphazard to U.S. observers. *See supra* note 44.

158. *See* CTR. FOR STRATEGIC & INT’L STUDIES & THE INST. FOR INT’L ECON., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 95 (C. Fred Bergsten, Bates Gill, Nicholas R. Lardy & Derek Mitchell eds., 2006) [hereinafter CHINA: THE BALANCE SHEET] (“China’s failure to protect intellectual property (IPR) is probably the second most important source of friction in the bilateral U.S.-China economic relationship.”).

159. *See* CHOW, *supra* note 46, at 152 (2003) (discussing the rules for implementation of national legislation and the fact that while departmental rules make up the majority of the legislation passed by the State Council, one of the governmental entities with legislating authority, there is no legal requirement to make its rules publicly available).

160. *Id.* at 143 (“At the national level, the [National People’s Congress], the NPC Standing Committee, and the State Council all have intrinsic legislative power.”).

for official passage until 2007.¹⁶¹ While this is not unlike the behind-the-scenes consensus building among U.S. Congressional legislators, the difference is that in China, it is not necessarily the voting members (or constituents) of the National People's Congress whose consensus is needed before such law is introduced for a vote.¹⁶² As such, in lieu of legislative history, this Article will look at statements issued by high-ranking governmental officials regarding trademark protection, which can serve as an analogue to legislative history, as these high-ranking government officials were, and continue to be, instrumental in enacting the Trademark Law and its subsequent revisions.

Similarly, an analysis of judicial decisions in China cannot be identical to an analysis of U.S. decisions. To begin with, Chinese courts are not bound by stare decisis.¹⁶³ A lack of stare decisis means that a judicial interpretation of the Trademark Law may not bind future interpretations or decisions outside that court's jurisdiction. While cases coming from more influential jurisdictions, such as Beijing and Shanghai, may be looked to for persuasive value by other regions, they are not binding. One example is the Beijing No. 2 Intermediate Court decision holding the landlord of the infamous Silk Market in Beijing (the hot spot for counterfeit products in Beijing) liable for the sales of counterfeit product at the market.¹⁶⁴ This was heralded by trademark owners as a landmark decision, but its reach is limited as merely persuasive in other cities with similarly infamous markets, such as Shanghai or Shenzhen. The reach of this case will be further limited as China has yet to develop a comprehensive system of reporting appellate-level cases (either officially or

161. See Lindsey Beck & Guo Shiping, *China Property Law Bolsters Private Rights*, REUTERS, Mar. 8, 2007, <http://www.reuters.com/article/worldNews/idUSSP36543620070308?sp=true>. ("The proposed law endured a record seven readings and was pushed off parliament's agenda [in 2006] after critics warned it would worsen social inequalities and trample China's socialist principles by putting private and state-owned property on an equal footing.").

162. The Standing Committee, the Politburo and other selected members of the Chinese Communist Party are the real behind-the-scenes decision-makers. See RICHMOND EDMONDS, *THE PEOPLE'S REPUBLIC OF CHINA AFTER 50 YEARS* 114 (2000). The NPC merely "rubber stamps" such approved legislation. See Opinion, *China's Next Revolution*, ECONOMIST, Mar. 10, 2007, at 11. For a more in-depth view of the workings of the Chinese government, see JAMES ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES* 51-74 (2005); VAI IO LO & XIAOWEN TIAN, *LAW AND INVESTMENT IN CHINA: THE LEGAL AND BUSINESS ENVIRONMENTS AFTER WTO ACCESSION* (RoutledgeCurzon 2005).

163. CHOW, *supra* note 46, at 212; LUO, *supra* note 46, at 105. Only official interpretations of the law promulgated by the Supreme People's Court are treated as binding principles of law. These interpretations are intended to clarify the law, but only provide guidance with regard to specific vagaries left by legislative drafting and it remains within a particular court's discretion as to the application of the principles. See HONG XUE & CHENGSI ZHENG, *CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY* xxxvii (Sweet & Maxwell Asia, 2002).

164. CCIT Patent and Trademarks Law Office, *Landlord and Tenants Jointly Liable for Trademark Infringement* (May 31, 2006), available at http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=5335&col_no=127&dir=200605.

unofficially), so the text of the judgment is not widely available.¹⁶⁵ Another factor that hampers the analysis of judicial decisions is the jurists' lack of awareness of the social planning theory underlying the Trademark Law, which can generate haphazard results. An analysis of Trademark Law cases reflects this lack of awareness.¹⁶⁶

Even with such drawbacks, an analysis of the modern justification of the Chinese Trademark Law is still worthwhile. While a handful of scholars have concluded that the Trademark Law is based on notions of social planning, there has yet to be a comprehensive analysis of the available materials similar to the one undertaken in this Article.¹⁶⁷

As discussed in Part III.B., *supra*, the Chinese notion of consumer welfare as the protection of consumer health and safety is a traditional value in China and continues to be, as more effective product safety laws develop.¹⁶⁸ The Chinese notion of distributive justice is a more recent

165. See LUO, *supra* note 46, at 248 ("Although more and more publications of Chinese cases and judgments have become available, China still lacks a comprehensive official or unofficial reporting system in which all appellate cases that have precedent value would be reported and published."). While this case was selected as one of the top intellectual property cases for 2006 (see Joseph Simone, *In the Courts: Holding the Landlord Liable—New Tools for the Counterfeit Crackdown in China*, WIPO MAG., Nov. 2007, available at http://www.wipo.int/wipo_magazine/en/2007/06/article_0006.html), the prevailing sentiment remains in favor of the landlords. Xu Chao, the vice-director of the copyright department of the National Copyright Administration, highlights this sentiment: "It is often difficult to shut down shops selling pirated products Many malls let out counters, and each counter is run independently. If they do something illegal, you would have to shut down the entire mall." Xie Chuanjiao, *Better IP Protection "Takes Time"*, CHINA DAILY, Apr. 18, 2008, at 3, available at http://www.chinadaily.com.cn/cndy/2008-04/18/content_6625873.htm. In addition, anecdotal evidence from the author's personal experience indicates that places removed from Beijing, such as Shenzhen, are unwilling to give much weight to this decision.

166. See *supra* note 44 and accompanying text.

167. See ALFORD, *supra* note 68, at 75 (stating that the Trademark Law "was looked to, at least by some in China's leadership, as providing an interim device for bringing order to a fledgling market."); Yu, *China Puzzle*, *supra* note 88, at 191 (concluding that a "[social planning] justification therefore fitted well with China in the early 1980s, and economic modernization provided the needed 'social planning' justification for a new intellectual property system."); Charles L. Miller, II, *A Cultural and Historical Perspective to Trademark Law Enforcement in China*, 2 BUFF. INTELL. PROP. L.J. 103, 123–24 (2004) (concluding that the Trademark Law stands for quality control).

168. While quality concerns are addressed legislatively by the Product Quality Law (promulgated by the Standing Committee of the National People's Congress, Feb. 22, 1993, and amended on July 8, 2000, effective Sept. 1, 2000), LAWINFOCHINA (P.R.C.), and the Consumer Protection Law (promulgated by the Standing Committee of the National People's Congress, Oct. 31, 1993, effective Jan. 1, 1994), LAWINFOCHINA (P.R.C.), events during 2007 relating to unsafe food and pharmaceutical products exported from China highlighted some severe shortcomings in the regulatory enforcement and legislative drafting. See MORRISON, *supra* note 123, at 8–11. Although the government has taken some steps to remedy the problems, it is too soon to tell whether these reforms will have any long-term effects. See, e.g., White Paper on Food Quality and Safety, Aug. 17, 2007, http://www.chinadaily.com.cn/china/2007-08/17/content_6032557.htm. In addition, to date the government has been primar-

concept of trademarks and is reflective of the economic reform movement from the 1980s. Distribution of welfare occurs when more people are allowed access to the market through a narrow application of the Trademark Law.

1. Plain Language of the Trademark Law

The Trademark Law is supplemented by implementing rules, implementing regulations, and interpretations by the Supreme People's Court.¹⁶⁹ The plain language of the Trademark Law is the source for the intent behind the legislation. The intent of the Trademark Law is stated in Article 1:

This Law is enacted for the purposes of improving the administration of trademarks, protecting the exclusive right to use trademarks, and of encouraging producers and operators to guarantee the quality of their goods and services and maintaining the reputation of their trademarks, with a view to protecting the interests of consumers, producers and operators and to promoting the development of the socialist market economy.¹⁷⁰

The phrase, "protecting the exclusive right to use trademarks . . .," arguably has overtones of the American utilitarian theory of intangible property rights in a trademark in which, through the goodwill, the owner builds up in her mark.¹⁷¹ But while property-type rights are inherent in an American trademark, an inference of property-type rights in the words "exclusive right to use" should not be made without further inquiry. An individual's right to property was only officially recognized in 2004 with an amendment to the Chinese Constitution and the very first law to protect an individual's property was passed in 2007.¹⁷² Since this phrase has

ily focused on the quality of edible products, which still leaves other consumer products vulnerable to the same regulatory and legislative shortcomings.

169. See CCH INC., CHINA INTELLECTUAL PROPERTY LAW GUIDE ¶¶ 20-810, 20-820, 20-830 (2007) (providing list of the regulations and interpretations that, along with the Trademark Law, comprise the current laws with respect to trademarks in China). See also LO & TIAN, *supra* note 162, at 162. Note that the current revisions to the Trademark Law seek to combine most of these sources into one statute.

170. Trademark Law, *supra* note 7, art. 1.

171. See, e.g., *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194 (1936) ("Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will."); *Hunt v. Phinney*, 2 Cal. Rptr. 57, 59 (Cal. Ct. App. 4th Dist. 1960) ("It has been repeatedly held that the goodwill of a business is property and as such will be protected by the courts."); MCCARTHY, *supra* note 54, § 2:20.

172. XIAN FA art. 13 (1982) (P.R.C.) (as amended in 2004); *China's Top Legislature Adopts Landmark Property Law*, Mar. 16, 2007, XINHUA, Mar. 16, 2007, available at LEXIS (Xinhua General News Service file); Beck & Shiping, *supra* note 161.

remained unchanged since the first adoption of the Trademark Law in 1982,¹⁷³ it would be misleading to automatically infer an intent to provide an individual right to property. In addition, in contrast to the Lanham Act's goal, "to protect registered marks used in such commerce from interference by State, or territorial legislation," there is no mention in Article 1, or elsewhere in the Trademark Law, of an individual's right to such trademark, even vis à vis the government. Despite the recent recognition of property rights, it is still unclear whether those rights, and those embodied in trademarks, would extend to protection against infringement by the government.¹⁷⁴

The second and third phrases, "and of encouraging producers and operators to guarantee the quality of their goods and services, and maintaining the reputation of their trademarks," appear to nudge the analysis back in favor of a utilitarian theory of trademarks. Maintenance or improvements in quality lead to the maintenance of a reputation, both of which are crucial to the function of trademarks under a utilitarian theory. It is this symbol of consistent quality that preserves the economic efficiency of reduced consumer search costs in the American utilitarian system.¹⁷⁵ However, maintenance or improvement of "quality" under the Lanham Act and the underlying utilitarian theory does not refer to the actual quality of the product, but rather to the consistency of quality across products marked with the same trademark.¹⁷⁶ This contrasts with

173. Compare 1982 version of the Trademark Law, *supra* note 7, art. 1 with the 1993 and 2001 versions. The 1982 version may be found at <http://www.chinatoday.com/law/A02.HTM> (last visited Jan. 11, 2009) and the 1993 version may be found at <http://www.chinaconsulatesf.org/eng/kj/wjfg/t43946.htm> (last visited Jan. 11, 2009).

174. Professor Alford, writing before the 2004 revision to the Chinese Constitution and the 2006 Property Law enactment, argued that one of the problems for intellectual property in China was the lack of property protection. See ALFORD, *supra* note 68, at 120.

175. See James M. Treece, *Trademark Licensing and Vertical Restraints in Franchising Agreements*, 116 U. PA. L. REV. 435, 446 (1968) ("The consumer wants a product for which there is a reasonable expectation that present quality will be like the quality of past products bearing the same mark."); see also *In re Application of Abcor Dev. Corp.*, 588 F.2d 811, 814 n.15 (C.C.P.A. 1978) ("a mark primarily functions to indicate a single quality control source of the goods or services involved, and this is meaningful only to prospective purchasers or patrons."); *Thomas Pride Mills, Inc. v. Monsanto Co.*, 1967 U.S. Dist. LEXIS 7985, *9 (N.D. Ga. 1967) ("The primary functions of a trademark are to indicate a single source of origin of the articles to which it refers and to offer assurance to ultimate consumers that articles so labeled will conform to quality standards established . . ."); Julius R. Lunsford, Jr., *Trademarks: Prestige, Practice and Protection*, 4 GA. L. REV. 322, 324 (1970) ("[the trademark] assures the customer that the goods bearing that trademark are of the same high quality which the customer has come to expect.").

176. See *El Greco Leather Prods. Co., Inc. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986) ("the actual quality of the goods is irrelevant; it is the control of quality that a trademark holder is entitled to maintain."); MCCARTHY, *supra* note 54, § 18:55 (providing an explanation of the quality function, insofar as there is no specific quality requirement, merely a consistency requirement).

the consumer welfare concept of trademarks embedded in the Trademark Law,¹⁷⁷ where selling products below adequate safety levels while using a trademark is a violation of the Trademark Law.¹⁷⁸

When read superficially, the fourth phrase, “with a view to protecting the interests of consumers, producers and operators,” also provides fodder for an interpretation that utilitarianism is the underlying theory of the Trademark Law, like the second and third phrases. One could argue that protecting the interests of consumers, producers and operators could be synonymous with the thrust of the Lanham Act’s intent: the prevention of consumer confusion which would erode lowered search costs, and protection of the property interests in a trademark. But this reading of “interests” would assume that the Chinese policymakers adopted the concepts embedded in American trademark laws.¹⁷⁹

For an interpretation of the “interests” from a Chinese perspective, one method is to look to the articulation of the Chinese interests by the policymakers. These interests appear to be mainly focused on economic development,¹⁸⁰ as Chinese policymakers have consistently tied trademark and intellectual property rights to the economic development of the country. The development of the Trademark Law almost appears synonymous with the development of the economy: “[i]t is the first law in the intellectual property field that established solid legal foundation in trademark area for China’s rapid and healthy economic development.”¹⁸¹ The Vice Chairman of the National People’s Congress Standing Committee, Lu Yongxiang, described in April 2008 how China’s progress in establishing and implementing its intellectual property system over the last thirty years has “played an active and prominent role in standardizing market economic order . . . and boosting economic and social development”¹⁸² Additionally, a June 2008 article appeared in the government-sponsored newspaper, *Xinhua*, discussing China’s intellectual property system. The article states, “It is China’s strategic goal to promote innovation and economic and social development.”¹⁸³ Furthermore, even the revisions of the Trademark Law in 1993 and 2001 were

177. See *supra* Part III.A.2.b.

178. See Yu, *Pirates to Partners*, *supra* note 78, at 953.

179. As noted earlier, reading any type of American property rights into the Trademark Law would be inappropriate. See *supra* Part III.B.3.

180. Other portions of the Trademark Law provide an articulation of the historical carry-over of the consumer welfare interest. See *infra* notes 188–191 and accompanying text.

181. *Protection in China*, *supra* note 26.

182. *Symposium on IP and 30th Anniversary of Reform and Opening Up Held in Beijing*, IPR IN CHINA, Apr. 28, 2008, <http://english.ipr.gov.cn/en/index.shtml> (follow “Government” hyperlink).

183. *Introduction of China’s Intellectual Property System*, XINHUA, June 16, 2008, <http://english.ipr.gov.cn/en/index/shtml> (follow “Government” hyperlink).

primarily “to meet the requirement of economic development” and only in part to meet the WTO entry requirements.¹⁸⁴

Lastly, once combined with the fifth and final phrase of the paragraph, “and to promoting the development of the socialist market economy,” which appears to modify the paragraph in its entirety, it is clear that the Trademark Law embraces social planning theory. While the “socialist market economy” has yet to be fully defined, it would appear from a policymaker’s perspective that this would include a redistribution of wealth from China’s economic growth. Some people “need to get rich first,”¹⁸⁵ but eventually, the goal is for the economic wealth to reach all social strata.¹⁸⁶

Other portions of the Trademark Law provide further evidence that social planning theory has been adopted as the primary justification. One example is Chapter VII, which lays out the protection granted to trademarks. Where the local Administration for Industry and Commerce (“AIC”)¹⁸⁷ determines that there is an act of trademark infringement in violation of Article 52 of the Trademark Law, the AIC is instructed to seize and destroy representations of the registered trademark pursuant to Article 53.¹⁸⁸ And “where it is impossible to separate the representations of the trademark from the goods involved, both of them shall be seized and destroyed.”¹⁸⁹ In practice, however, if the product merely has an infringing label, then the label will be removed, but the remainder of the

184. *Id.* In yet another example of this articulation, President Hu Jintao gave a June 2007 speech regarding intellectual property protection in China, revealing that progression of economic development continues to be one of the main rhetorical reasons for strong intellectual property rights. As stated by President Hu, “On China’s economic protection . . . China will be firmly committed to [intellectual property rights] development.” Economic development is still seen as the best way for China to distribute the wealth across the nation. President Hu stated further, “China’s fast economic development has . . . improved the lives of the Chinese people . . .” *President Hu Jintao: IPR Is Common Benefit of All Countries*, IPR IN CHINA, June 11, 2007, <http://english.ipr.gov.cn/en/index.shtml> (follow “Government” hyperlink).

185. See Lo, *supra* note 25, at 29 (describing Deng Xiaoping’s vision as one to “eliminate poverty without polarizing society into rich and poor strata”).

186. See CHINA: THE BALANCE SHEET, *supra* note 158, at 31.

187. The AIC is the governmental agency primarily charged with administrative enforcement of the Trademark Law, although other agencies may have the power to enforce trademarks due to other concerns such as quality. See *supra* note 78.

188. Trademark Law, *supra* note 7, art. 53 (“Where it is established that the infringing act is constituted in its handling the matter, the administrative authority for industry and commerce handling the matter shall order the infringer to immediately stop the infringing act, confiscate and destroy the infringing goods and tools specially used for the manufacture of the infringing goods and for counterfeiting the representations of the registered mark, and impose a fine.”).

189. Regulations for the Implementation of the Trademark Law (promulgated by State Council Nat’l People’s Cong., Aug. 3, 2002, effective Sept. 15, 2002) art. 45, LAWINFOCHINA (P.R.C.), available at http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2162&col_no=119&dir=200603.

product will go back on the market. This practice was confirmed by a state-level AIC, which stated in a reply to an inquiry on the definition of “destroy” in Article 53 that, “[f]or commodities of trademark infringement confiscated in accordance with the law, those that have useful value and the infringement trademark can be separated from the commodities may be disposed of by ways other than ‘destroy’.”¹⁹⁰ In addition, if tooling or other equipment used to make the infringing products does not bear the infringing trademarks, then the tooling or equipment will not be seized, and may be left with the infringer.¹⁹¹ In such instances, this allows for the infringer not to suffer a total loss on his business, but at the same time, provides some protection to the brand owner on a limited case-by-case basis, which reflects the distributive theory of the Chinese Trademark Law.¹⁹²

2. Judicial Decisions

Turning to an analysis of Chinese judicial decisions, a macro-level review reveals consistency reflective of the redistribution concept of the Chinese social planning theory. Where trademark infringement is found, most judicial decisions award a very modest value of damages to the victorious plaintiffs.

Article 56 of the Trademark Law specifies that the infringer’s profits or the loss to the plaintiff should determine the damages awarded in cases where a court finds infringement, in addition to awarding the prevailing plaintiff’s legal expenses.¹⁹³ However, if the defendant’s profits cannot be easily determined, the default award is RMB 500,000 (approximately \$73,000).¹⁹⁴ In addition, if the defendant’s infringement is

190. Reply on How to Understand the Relevant Requirement in Art. 53 of the Trademark Law (published by the State Admin. For Industry & Commerce, Oct. 21, 2002), LAWINFOCHINA (P.R.C) [hereinafter SAIC, *Reply*]. This practice is also confirmed through anecdotal evidence provided by MERTHA, *supra* note 3, at 165, and the author’s personal experiences.

191. Article 53 of the Trademark Law specifies that the tooling needs to be “specially used for the manufacture of the infringing goods and for counterfeiting the representations of the registered trademark” before the AIC shall confiscate and destroy such tooling. Trademark Law, *supra* note 7, art. 53.

192. See discussion *supra* Part III.B. This is also reflected in the disposal of products seized by customs, see discussion *infra* Part V.A.

193. Trademark Law, *supra* note 7, art. 56 (“The amount of damages shall be the profit that the infringer has earned because of the infringement in the period of the infringement or the injury that the infringe has suffered from the infringement in the period of the infringement, including the appropriate expenses of the infringer for stopping the infringement.”).

194. *Id.* (“Where it is difficult to determine the profit that the infringer has earned because of the infringement in the period of the infringement or the injury that the infringer has suffered from the infringement in the period of the infringement, the People’s Court shall impose an amount of damages of no more than RMB 500,000 Yuan according to the circumstances of the infringement.”).

unintentional, the plaintiff may not recover damages at all.¹⁹⁵ To clarify Article 56, the Interpretations of the Supreme People's Court Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising From Trademarks (the "Interpretation") provides guidelines to the People's Courts in Articles 13 through 17.¹⁹⁶

Although the Interpretation gives the court discretion to calculate damages for the trademark holder,¹⁹⁷ most of the court's decisions award the maximum damages allowed by law, which in many instances fall far short of the damages claimed by the plaintiffs.¹⁹⁸ While the published decisions fail to explain the judges' reasons for their holdings,¹⁹⁹ the net effect furthers what the Supreme People's Court views as its obligations to society, which are "to solve social conflicts, maintain social stability, guarantee economic development, promote social harmony, and realize fairness and equity."²⁰⁰ In granting small awards to plaintiffs, the defendants are allowed to continue in their business activities (albeit

195. *Id.* ("Anyone who sells goods that it or he does not know has infringed the exclusive right to use a registered trademark, and is able to prove that it or he has obtained the goods legitimately and indicates the supplier thereof shall not bear the liability for damages.").

196. Supreme Ct. Interpretation, *supra* note 44, arts. 13–17.

197. *Id.* art. 13.

198. A study of intellectual property case awards from 2002 to 2008 show that the average of damages awarded was approximately fifteen percent of the intellectual property owner's damages claim. The study combined copyright, patent and trademark cases. See KRISTINA SEPETYS & ALAN COX, NERA ECONOMIC CONSULTING, INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA: TRENDS IN LITIGATION AND ECONOMIC DAMAGES 8 (2009), http://www.nera.com/image/PUB_IP_Rights_Protection_China_0109.pdf. For a sample of trademark-only cases, see, e.g., *Bonneterie Cévenole S.A.R.L. v. Shanghai Meizheng Co.*, LAWINFOCHINA (Shanghai Higher People's Ct., July 6, 2004) (awarding RMB 500,000 plus RMB 11,258 for legal expenses to plaintiff, although plaintiff claimed RMB 1.1 million in damages and provided evidence of defendant's profits); *Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.*, LAWINFOCHINA (Jiangsu Higher People's Ct., Aug. 26, 2005) (awarding RMB 20,000 to plaintiff, although plaintiff claimed RMB 500,000 as damages due to its reasonable expenses in enforcing its trademark); *Starbucks Corp. & Shanghai President Coffee Corp. v. Shanghai Starbucks Cafe Co. Ltd.*, Nanjing Road Branch, LAWINFOCHINA (Shanghai No. 2 Interim. People's Ct., Dec. 31, 2005, *upheld on appeal*, Shanghai Higher People's Ct., Dec. 20, 2006) [hereinafter *Starbucks Case*] (awarding RMB 500,000 to the plaintiff, although plaintiff claimed RMB 1.06 million in damages and provided evidence of defendant's profits); *The Extra-Budgetary Funds Admin. Bureau of Guannan Cty. & Liangxianghe Co. v. Tao Qin*, LAWINFOCHINA (Jiangsu Higher People's Ct., Sept. 8, 2006) (awarding RMB 100,000 to plaintiff, although plaintiff claimed RMB 200,000 in damages).

199. See, e.g., *Starbucks Case*, *supra* note 198 (plaintiffs had brought evidence of profits made by defendants but the court held (without analysis) that the evidence was not sufficient to award anything more than the statutory maximum).

200. Notice of the Supreme People's Court on Printing and Distributing Some Opinions of the Supreme People's Court About Providing Judicial Protection for the Construction of Socialist Harmonious Society, pt.I.1. (promulgated by the Supreme People's Ct., Jan. 15, 2007) LAWINFOCHINA [hereinafter *Supreme Ct. Notice*].

sometimes with using a new trademark).²⁰¹ This outcome is antithetical to the American utilitarian viewpoint.

In particular, an American viewing the Chinese system through a utilitarian lens would expect the courts to apply the laws in a way that would deter future violations, punish free-riding on the owner's trademark and compensate for damage caused by such infringement through a large monetary award to the plaintiff. This would be especially true in instances where an intentional infringement has occurred. From an American viewpoint, the generally small amounts awarded appear to stem from Chinese jurists' lack of willingness to enforce the Trademark Law.²⁰² However, when viewed through the lens of the Chinese social planning theory, the defendant has been punished, but in a manner that protects both the trademark owner and the defendant, thus "taking the protection of basic interests of the vast people as the starting point."²⁰³ Since the plaintiffs are usually large and established companies, they do not need a large monetary award. However, a large award would, in most cases, likely put the defendants out of business. As such, an application of a distributive theory of the Trademark Law militates in favor of small monetary awards; however, in cases where malicious intent was shown on the part of the defendant, a public apology may be ordered.²⁰⁴ There are recent cases where the monetary awards have been higher than the maximum default amount allowed under the Trademark Law.²⁰⁵ How-

201. For example, in the *Starbucks Case*, the Shanghai Starbucks Café could easily have afforded the RMB 500,000, as the defendant's profit was in excess of RMB 2.6 million over the three years prior to the lawsuit (assuming the reliability of the plaintiffs' evidence). See *Starbucks Case*, *supra* note 198, pt.III. As such, the defendant was able to build up its clientele by free-riding on the goodwill of the Starbucks trademark and by virtue of the small damage award, could continue as an ongoing coffee business, albeit under a new mark.

202. See, e.g., Letter from Eric H. Smith, President, IIPA, to Sybia Harrison, Special Assistant to the Section 301 Committee, Office of the U.S. Trade Representative 19–20 (Feb. 9, 2005), available at http://www.iipa.com/rbc/2005/CHINA%202005_Feb9_PRC_OCR_Submission.pdf (describing the low level of awards in copyright infringement cases as an enforcement problem); Ruay Lian Ho, *Compliance and Challenges Faced by the Chinese Patent System Under TRIPS*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 504, 522 (2003) (quoting, "won the case but lost the money," which is used to describe the enforcement of Chinese intellectual property protection law. "The joke highlights the embarrassing dilemma of a country trying to conform its IP law to a world standard while at the same time trying to protect its developing industries.").

203. *Supreme Ct. Notice*, *supra* note 200.

204. See e.g., *Starbucks Case*, *supra* note 198 (requiring infringer to publish a public apology). These public apologies are considered a heavy punishment for infringers, as the apology causes the infringer to "lose face" in the eyes of the marketplace. "[L]oss of 'face' means reduced social resources to use in cultivating and developing one's connection network." HAROLD CHEE & CHRIS WEST, MYTHS ABOUT DOING BUSINESS IN CHINA 48 (2004).

205. See, e.g., Press Release, Yamaha Motor Corp., June 12, 2007, <http://www.yamaha-motor.co.jp/global/news/2007/06/12/trademark.html> (announcing that the Supreme Court upheld the decision of the Jiangsu Higher People's Court awarding Yamaha RMB 8.3 million

ever, these cases should be considered outliers because there are no indications that large monetary awards are becoming a trend.²⁰⁶

As seen in this section, the Chinese Trademark Law has, from its inception in 1982, been founded upon consumer welfare and redistribution theories, the effects of which continue to the present day. This may not come as a surprise to those China scholars who acknowledge that China is still very much entrenched in socialism with a tradition of paternalistic government. However, to those in the United States who have blindly applied the American theory of utilitarianism to the Chinese Trademark Law, this analysis will provide long-term benefits, as discussed *infra* in Part V.

C. Utilitarianism Is an Inappropriate Lens for the Trademark Law

Putting aside the inherent difficulty in applying an economic theory that promotes efficiency to a socialist-planned market economy, a reduction in consumer search costs as a social benefit to Chinese society is not one that is currently supported by the Chinese economy at this point in its economic development. The benefits of reduced consumer search costs are not supported because it presumes the ability to purchase consumer products and the continual availability of the same consumer products.

for trademark infringement of the three defendants. This award was the highest ever awarded to a foreign company for trademark infringement.).

206. See, e.g., *Italian Gucci Wins lawsuit Against Chinese Shoes Maker*, XINHUA, Apr. 14, 2008, available at LEXIS (Xinhua General News Service file) (reporting that a well-known Chinese shoe manufacturer was ordered by the People's Court of Shanghai Pudong District to pay Gucci RMB 180,000 for manufacturing a line of shoes that infringed upon Gucci's trademarked pattern, although Gucci had requested RMB 610,000 in compensation from the shoe company and the department store that sold them); *Louis Vuitton Wins Counterfeit, Patent Dispute Cases in China*, XINHUA, Mar. 18, 2008, available at LEXIS (Xinhua Economic News Service file) (reporting that the Dongguan Intermediate People's Court ordered a five-star hotel liable for the counterfeit sales of one of the stores located in the hotel, awarding RMB 100,000 to Louis Vuitton, although Louis Vuitton had requested RMB 500,000 in compensation); *Puma Awarded 70,000 Yuan Over Trademark Case*, SIPO, Dec. 12, 2007, www.sipo.gov.cn/sipo_English (follow "News" link; then follow "IPR Special" Link) (reporting that three defendants were ordered to pay Puma an aggregate of RMB 70,000 by the Zhuhai People's Intermediate Court, even though Puma had requested RMB 150,000); *U.S. Outdoor Clothing Maker Wins Lawsuit Against Beijing Clothes Market*, XINHUA, Oct. 30, 2007, available at LEXIS (Xinhua Economic News Service file) (reporting that the Beijing No. 2 Intermediate Court ordered the Beijing Silk Market landlord, the Beijing Xiushui Clothing Company, to pay North Face RMB 40,000 for allowing sales of counterfeit product, although North Face had requested RMB 500,000 in compensation); *Nike Wins Compensation for Trademark Infringement Case*, IPR IN CHINA, Aug. 24, 2007, <http://english.ipr.gov.cn> (follow "Cases" link; then follow "Trademark" link) (reporting that Nike was awarded a total of RMB 340,000 from the three defendants it had sued in the Shanghai No. 2 Intermediate People's Court, although it had requested RMB 500,000).

First, the application of utilitarianism assumes ability to purchase consumer items (as opposed to household staples). However, the average Chinese consumer lacks the ability to learn about the majority of brands available for sale, which are generally foreign, as domestic brands have been slow to develop.²⁰⁷ The average Chinese consumer does not have the disposable income to pay for the premiums associated with high-quality foreign brands; some research studies have “estimated that less than 10 percent of Chinese consumers have the level of disposable income that can afford to buy Western products.”²⁰⁸ The average per capita disposable income in urban areas in 2007 was RMB 13,786 (approximately \$2,018), which is a 17.2 percent increase from 2006.²⁰⁹ The rural area average per capita net income for rural areas in 2007 RMB 4,140 (approximately \$606), which represents a 15.4 percent year-on-year growth rate.²¹⁰ Overall consumption as measured by retail sales grew 16.8 percent in 2007.²¹¹ These statistics show that while disposable income and consumption may be growing hand-in-hand, it is a relatively new phenomenon.

Second, the application of utilitarianism assumes that the consumer brands available for sale are fairly static; that the brand a consumer purchased last month will still be available for sale this month. However, the Chinese consumer market is new and ever-changing. In a market where “consumers are still experimenting, and brands come and go with great speed,”²¹² it is hard to see the benefit of reduced consumer search costs for the average Chinese consumer. With ever-changing brands, the benefit of reduced consumer search costs is currently low.²¹³

In addition, American utilitarianism does not promote the benefits that social planning theory currently promotes in China. U.S. trademark law is not used to promote the protection of the health and safety of consumers, nor the redistribution of wealth. Instead, such goals are fostered through other policies. In the United States, unsafe quality levels are policed by consumer and product safety laws. However, in China, where consumer and product safety laws have not been as effective, it is clear

207. Yu, *China Puzzle*, *supra* note 88, at 201.

208. CHEE & WEST, *supra* note 204, at 31.

209. THE U.S.-CHINA BUSINESS COUNCIL, FORECAST 2008: CHINA'S ECONOMY 2 tbl.1 (2008), available at <http://uschina.org/public/documents/2008/02/2008-china-economy.pdf>.

210. *Id.*

211. *Id.*

212. CHEE & WEST, *supra* note 204, at 30.

213. In contrast, the American consumer values the ability to choose between different brands of similar products. See Bone, *supra* note 24, at 2108 (“Put simply, if consumers lacked the ability to distinguish one brand from another, firms would have no reason to create brands with more costly but higher quality characteristics. Consumers would be left to choose from a range of products far too limited to satisfy the full range of their preferences, and economic efficiency would suffer as a result.”).

that the welfare concept cannot be soon divorced from the concept of trademarks.²¹⁴ In relation to redistribution of wealth, traditional American utilitarianism contends that it is through non-judicial means that redistributive concerns should be met.²¹⁵ Although there are some hints that China may be moving towards similar thinking, it is too early to tell if such thought will gain traction or effect the theory of the Trademark Law.²¹⁶

Given the disconnect between the two systems, it is clear that a continued use of utilitarian arguments will not persuade China to revise its laws or policies in the manner the United States desires. However, there are indications that an acceptance of trademarks (although previously a foreign concept) is becoming more widespread.²¹⁷ While statistics do not provide a complete picture of progress, some studies do show that more domestic Chinese entities and individuals are taking advantage of the

214. There is evidence to suggest that having parallel bureaucratic agencies charged with the same quality control oversight for trademarked products may spur more effective enforcement of trademark laws. See MERTHA, *supra* note 3, at 188–92 (describing the competitive behavior between the local offices of Administration for Industry and Commerce and the State Quality Technical Supervision Bureaus that create better chances for enforcement of trademark infringement).

215. See, e.g., Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 958 (1985) (summarizing the American classical law and economics viewpoint: “So long as [the laws of economic life] continued in operation, the egalitarian impulse to redistribute wealth by manipulating the legal system inevitably involved both injustice and a counterproductive reduction in total wealth.”); Pierre Schlag, *An Appreciative Comment on Coase’s The Problem Of Social Cost: A View From the Left*, 1986 WIS. L. REV. 919 (discussing how the law and economics movement has ignored distributive justice concerns); see generally Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) (defending the use of the income tax and transfer system to redistribute wealth and not legal rules). But see generally Nicholas L. Georgakopoulos, *Solutions to the Intractability of Distributional Concerns*, 33 RUTGERS L.J. 279 (2002) (arguing that law and economics can and should take redistributional rules into account).

216. See e.g., Hu Jintao, Report to the Seventeenth National Congress of the Communist Party of China, Oct. 15, 2007, pt.VIII.3, translated and published as *Full Text of Hu Jintao’s report at 17th Party Congress*, XINHUA, Oct. 25, 2007, available at LEXIS (Xinhua General News Service File) (“We will increase transfer payments, intensify the regulation of incomes through taxation . . . and overhaul income distribution practices with a view to gradually reversing the growing income disparity.”).

217. See, e.g., Qishan, *supra* note 29 (describing the June 2008 release of China’s national intellectual property strategy); Yu, *Sweet and Sour*, *supra* note 34, at 7 (providing three reasons for the progress in China); Joseph A. Massey, *The Emperor Is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986–2006*, 7 CHI. J. INT’L L. 231, 236 (2006) (discussing the improvements in China since 2001); Anne M. Wall, *Intellectual Property Protection in China: Enforcing Trademark Rights*, 17 MARQ. SPORTS L. REV. 341, 416 (2006) (concluding that China is taking intellectual property more seriously); see also *infra* note 219. If there were little to no trademark protection in China, as some U.S. companies argue is the case, then the reverse should be true—“The result would be a race to produce inferior products, rather than competition to produce better ones.” MCCARTHY, *supra* note 54, § 2:3.

trademark system: in 2006, out of the 766,000 applications for trademark registration received by the Trademark Mark Office, 668,957 were domestic trademarks.²¹⁸ The anecdotal evidence arising from a microscopic level of review shows that more and more parts of Chinese society are seeing the benefits of trademark protection.²¹⁹

If the United States wants to become more successful in its efforts in China, a justification that resonates with China is needed. As “some things cannot be legislated,” grass-roots acceptance of the importance of trademark protection is needed for long-term change.²²⁰ As shown in this section, U.S. utilitarian arguments are unlikely to be a resonating justification at this point in China’s development.

V. MUCH ADO ABOUT THEORY: PRACTICAL APPLICATION

While theory will never provide complete answers to specific, difficult doctrinal issues, it can operate to inform discussion and debate, especially regarding changes to laws and policies.²²¹ An understanding of the main justifications that underlie the Trademark Law is the first step towards improving U.S. efforts in China and perhaps even in resolving the conflict between the two countries. There are two applications of this new understanding that can be implemented immediately. The first is a reframing of U.S. arguments to include elements of the Chinese social planning theory.²²² The second is to better inform the U.S. educational

218. INTELLECTUAL PROPERTY PROTECTION IN CHINA, REPORT ON CHINA’S INTELLECTUAL PROPERTY PROTECTION IN 2006, pt.III (June 4, 2007), http://english.ipr.gov.cn/ipr/en/info/rtitle.jsp?a_no=81228&col_no=102&dir=200706.

219. Intellectual Property Protection in China, Newsletter Regarding IPR (Oct. 30, 2007), (Nov. 1, 2007) <http://english.ipr.gov.cn/en/index.shtml> (follow “Activities” hyperlink; then follow “Newsletter regarding IPR” hyperlink) (discussing the application of the trademark “Yuba Village Music-Fed Eco Chicken” in Qionglai village where farmers selling chickens with this mark have reportedly doubled the price of their chickens). Although some may question the accuracy of this portrayal (the news source is a Chinese government-run newspaper), it provides an inkling to the momentum growing at the grassroots level, and a potential for a future where a utilitarian theory may be applicable.

220. See Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT’L & COMP. L. 37, 44 (2002) (“For an [intellectual property] regime to work well, there must be a belief in the country that the country’s interests are well served.”).

221. Fisher, *Theories*, *supra* note 48, at 194.

222. This Article acknowledges that there may be political reasons that could preclude the United States from reframing its arguments from the standpoint of the Chinese social planning theory, as the distributive element provides trademark access to infringers (among other possible concerns). However, even if such reasons were to hamper the reframing of the U.S. arguments, an understanding of trademark law from the Chinese perspective will continue to be a useful tool for more successful negotiations.

initiatives aimed at the Chinese judiciary, administrative agencies and enforcement officials.²²³

*A. First Application: Frame Arguments in
Terms of Social Planning Theory*

The recent WTO dispute between the United States and China highlights the misapplication of the U.S. utilitarian theory and the lack of understanding of the Chinese social planning theory. In June 2007, the U.S. requested formal consultations with China through the WTO to resolve three areas in the Chinese law and policy that the United States perceived as failing to meet the WTO requirements under TRIPS.²²⁴

The United States then requested the WTO to establish a dispute settlement panel (the "WTO Panel")²²⁵ in September 2007 after formal consultations failed to achieve results satisfactory to the United States on the three areas of contention.²²⁶ The WTO released its panel report in January 2009 (the "DS362 Panel Report"), which found partly in favor of the United States and partly in favor of China.²²⁷ While the United States may decide to appeal the WTO Panel decision (as may China), it is unlikely that the areas where the WTO Panel found in favor of China²²⁸

223. For example, education initiatives are being led by the U.S. Chamber of Commerce (*see* <http://www.uschamber.com/international/asia/china/iff.htm> for listings (last visited Jan. 11, 2009)), the U.S. Department of Commerce (*see* <http://www.export.gov/china> for listings (last visited Jan. 11, 2009)), and the University of California, Berkeley, Center for Research on Chinese & American Strategic Cooperation (*see* <http://crc.berkeley.edu/newsandevents.asp> (last visited Jan. 11, 2009)).

224. Press Release, Office of the United States Trade Representative, United States Files WTO Cases Against China Over Deficiencies in China's Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries (April 9, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Files_WTO_Cases_Against_China_Over_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_Market_Access_Barr.html.

225. Press Release, DSB Establishes a Panel on China's Protection of IPR and a Compliance Panel to Review U.S. Implementation in "Zeroing" Case, W.T.O. (Sept. 25, 2007), http://www.wto.org/english/news_e/news07_e/dsb_25sep07_e.htm.

226. Press Release, Office of the United States Trade Representative, United States Requests WTO Panel in Case Challenging Deficiencies in China's Intellectual Property Rights Laws, Office of the U.S. Trade Rep. (Aug. 13, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/August/Section_Index.html ("The United States and China have tried, through formal consultations over the last three months, to resolve differences arising from U.S. concerns about inadequate protection of intellectual property rights in China. That dialogue has not generated solutions to the issues we have raised, so we are asking the WTO to form a panel to settle this dispute.").

227. The WTO Panel found that China's Copyright Law was inconsistent with Articles 9.1 and 41.1 of TRIPS and that the China Customs measures were inconsistent with the fourth sentence of Article 46 of TRIPS. *See* DS362 Panel Report, *supra* note 40, ¶ 8.1(a)–(b).

228. The WTO Panel found that the United States had not established that China Customs measures were inconsistent with the first sentence of Article 46 of TRIPS, nor did the United States establish that the criminal thresholds maintained by China were inconsistent

will change without the United States bringing another WTO case or a change in its negotiating strategy.²²⁹ In addition, it is unlikely that any further changes desired by the United States will be undertaken by China without having to resort to similar tactics if the U.S. negotiating strategy does not change,²³⁰ as the United States has seen that deploying such tactics can alienate the Chinese government and policymakers.²³¹ The aftermath of the 2007 request by the United States has been decreased cooperation by the Chinese government and its desire to engage in bilateral and cooperative discussions about intellectual property changes.²³² The United States needs a new mindset and tools in order to improve its short-term efforts in China, and more long-term, to come to a reconciliation with the Chinese system.²³³

As a first application of the understanding provided by this Article, the United States can incorporate elements of the social planning theory into its arguments. As examples, the trademark-related issues of DS362 will be used to show how the utilitarian arguments of the United States can be reframed by incorporating the Chinese theory.

with Article 61 of TRIPS. *See id.* ¶ 8.1(c). The criminal thresholds maintained by China are viewed by the United States as one of the major weaknesses of China's enforcement of intellectual property laws. *See* 2007 REPORT, *supra* note 2, at 76. While the WTO Panel clarified China's obligation under TRIPS to provide for such criminal procedures and penalties, the Panel Report ultimately concluded that there was not enough evidence to show that China had violated TRIPS with its criminal thresholds. *See* Press Release, Office of the United States Trade Representative, United States Wins WTO Dispute Over Deficiencies in China's Intellectual Property Rights Laws (Jan. 26, 2009), http://www.ustr.gov/assets/Document_Library/Press_Releases/2009/January/asset_upload_file105_15317.pdf [hereinafter U.S.T.R. WTO Press Release].

229. The WTO Panel decision has left the possibility for the United States to bring a future action against China on its criminal thresholds as the WTO Panel merely found that the United States did not bring enough evidence to prove TRIPS violation. *See* DS362 Panel Report, *supra* note 40, ¶¶ 7.652, 7.661, 7.667.

230. While the United States only included three areas in the Chinese policy and law that allegedly violated TRIPS, there are a number of other items that the United States believes need to be changed. *See supra* note 39 and accompanying text.

231. *See supra* note 36 and the accompanying text.

232. *See id.*

233. This is true even though it may seem to be in China's best interest to strengthen its trademark protection in the wake of the 2008 Beijing Olympics and for the upcoming 2010 World Expo in Shanghai. Short-term or region-specific improvements may be made voluntarily but it is highly unlikely that long-term, nation-wide progress will take place. *See* Yu, *Pirates to Partners*, *supra* note 78, at 991–99 (arguing that while it may be in China's best interest to improve trademark protection and intellectual property on the whole due to the Olympics and the World Expo, due to these being "country of countries" events, such improvements will likely not extend past the major cities and coastal areas, which are more economically advanced than the other parts of China).

The first item of DS362 is that China's prosecution thresholds for involving trademark infringement are inadequate.²³⁴ Contained within the Criminal Law (with respect to trademark crimes, i.e., counterfeiting) are very vague notions of thresholds needed to be satisfied in order to prosecute an individual or a "unit."²³⁵ The United States raised this as an item of dispute for three reasons. The first is that certain criminal acts of counterfeiting will not be prosecuted due to these high thresholds. Second, "as a result of the thresholds . . . there are cases of willful trademark counterfeiting and copyright piracy on a commercial scale for which the remedies of imprisonment and/or monetary fines sufficient to provide a deterrent are not available in China."²³⁶ And finally, the United States claims that these thresholds violate the requirements for enforcement procedures under Part III of TRIPS.²³⁷

The first two reasons given by the United States come straight from the American utilitarian theory of trademark law. From this perspective, the current thresholds contained within the Chinese law are an affront because they do not provide disincentives not to engage in criminal acts of trademark counterfeiting. This type of free-riding is exactly what a utilitarian-based trademark legal system seeks to protect. As explained by Professor McCarthy,

Such [a] "free rider" is an economic parasite who must be enjoinable by the law. If such an infringer is not enjoinable, the quality encouragement function is destroyed. If all may take a free ride on the successful seller's mark and reputation, there is no incentive to distinguish one's own goods and service.²³⁸

234. Second Submission of the United States of America, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 2, WT/DS362, May 27, 2008 [hereinafter *Second U.S. Submission*]. The WTO Panel found in favor of China on this item, citing that the United States did not establish that these criminal thresholds were inconsistent with TRIPS. See DS362 Panel Report, *supra* note 40, ¶ 7.681.

235. See *Panel Request*, *supra* note 16, at 2.

236. *Id.*

237. *Id.* at 3. Part III of TRIPS lays out obligations of member nations to provide for enforcement procedures (injunctions, administrative relief, border protection issues, etc.) but the specific provision referred to by the United States here is Section 1 of Part III, General Obligations, Articles 41.1 and 61. Article 41.1 states in part, "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement . . ." (emphasis added). TRIPS, *supra* note 8, art. 41.1. The WTO Panel did not rule on the Article 41.1 claims. See DS362 Panel Report, *supra* note 40, ¶ 7.682.

238. MCCARTHY, *supra* note 54, § 2:4; see also *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992) ("Achieving fame for a mark in a marketplace where countless symbols clamor for public attention often requires a very distinct mark, enormous advertising investments, and a product of lasting value. After earning fame, a mark benefits not only its owner, but the consumers who rely on the symbol to identify the source of

As argued in Part IV.B, under the Chinese social planning theory of trademark law, the distributive goal takes into account more than just consumers and brand owners. Arguments based on free-riding do not persuade officials who see trademark law protection as a way to redistribute the wealth (even to counterfeiters), especially the wealth of foreign companies.²³⁹ A social planning theory-based argument in favor of revising the thresholds in the Criminal Law would be one that combined all interests to show that in not providing stronger measures to criminally prosecute counterfeiting, consumers and brand owners are disproportionately harmed in relation to the benefit brought about by keeping counterfeiters in business. In addition, one could also argue that the majority of counterfeited products available for sale are not in compliance with the minimum levels of quality and as such, harm the healthy and safety of Chinese consumers.²⁴⁰

Violation of law arguments are just as unlikely to persuade the Chinese to revise their laws as are utilitarian arguments, although they provide solid grounds to bring a dispute to the WTO. But China is unlikely to admit that its laws do not meet its TRIPS obligations; in fact, Chinese officials strongly assert that China is meeting its obligations and that "it is not right for [the U.S.] to observe China while wearing blinkers" ²⁴¹ Under Part III of TRIPS, Article 41(1) requires that "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement" ²⁴² The term "effective action" is subjective, and TRIPS

a desired product. Both the mark's fame and the consumer's trust in that symbol, however, are subject to exploitation by a free rider."); *Kroger Co. v. Johnson & Johnson*, 570 F. Supp. 1055, 1060 (S.D. Ohio 1983) ("To permit a bystander who has spent a minimum of time, money, and effort in developing its product to profit by marketing the identical commodity with a similar name and packaging is contrary to the stated Congressional purpose of the Lanham Act This case is somehow reminiscent of the plight of the Little Red Hen whose friends declined to plant, harvest or thresh the wheat; grind or bake the flour, but were all too ready to share with her the bread that resulted." (citation omitted)).

239. The majority of the plaintiffs or complaining trademark owners are foreign companies, as they have the capital to be able to expend on enforcement activities. See MERTHA, *supra* note 3, at 194–96.

240. While the counterfeiting business is increasingly an export business, counterfeit products are also for sale to Chinese consumers. See Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203, 213–14 (2006); see also Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 357 (2006). A focus on health and safety concerns is acknowledged to sometimes be more effective than arguments based solely on intellectual property concerns. See Yu, *Pirates to Partners*, *supra* note 78, at 954.

241. *West Wrong to Criticize IPR Record: Official*, *supra* note 33. See also Qishan, *supra* note 29 (stating that "[Intellectual property rights] protection in China has paid off."); Chuanjiao, *supra* note 165.

242. TRIPS, *supra* note 8, art. 41(1).

itself recognizes that each Member is allowed to implement the requirements of TRIPS according to their “own legal system and practice.”²⁴³ As the WTO Panel declined to rule on the Article 41(1) claims,²⁴⁴ it is unclear if this type of argument will be effective in any future WTO disputes that the United States may bring against China for its intellectual property enforcement. In addition, since TRIPS does not require a member country to expend more governmental resources on intellectual property enforcement than in other areas, China may have a good argument in future disputes that it expends an adequate amount of resources on intellectual property enforcement vis-à-vis other issues that take precedence.²⁴⁵

The second item cited in DS362 by the United States alleged that the disposal of confiscated products that infringe on trademark rights by Chinese Customs is contrary to Articles 46 and 59 of TRIPS.²⁴⁶ Article 46 provides that in the first instance, infringing goods seized by authorities shall be disposed of in a manner that will avoid harm to the brand owner, but destruction is not required if contrary to the relevant member’s constitutional requirements.²⁴⁷ In the case of counterfeit products, the fourth sentence of Article 46 provides, “the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.”²⁴⁸ Article 59 of TRIPS provides that government authorities shall have the authority to order destruction or disposal of infringing products pursuant to the principles of Article 46 and further reiterates Article 46’s prohibition, “In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered

243. *Id.* art. 1(1). The WTO Panel in the did not rule on the Article 41.1 claims in this dispute. See DS362 Panel Report, *supra* note 40, ¶ 7.682.

244. *See id.*

245. *See Yu, Pirates to Partners*, *supra* note 78, at 935 (“If China were able to show that their enforcement problems with piracy and counterfeiting were no more excessive than their problems with, say, tax collection (which are very serious), China would be likely to prevail [in a WTO dispute settlement process]. After all, it is hard to imagine any country putting intellectual property protection ahead of tax collection. Nor does the WTO require it to do so.”).

246. *Second U.S. Submission*, *supra* note 234, at 32.

247. The WTO Panel opined that the United States had not established that China’s Customs measures were inconsistent with this first sentence of Article 46. *See* DS362 Panel Report, *supra* note 40, ¶ 7.395(b). The WTO Panel seemed to give particular weight to the statistical evidence from China that showed “that, in practice over half of infringing goods seized by Customs in terms of value are in fact destroyed.” *See id.* ¶ 7.250.

248. TRIPS, *supra* note 8, art. 46. The WTO Panel did find that the China Customs regulations were inconsistent with the fourth sentence of Article 46. *See* DS362 Panel Report, *supra* note 40, ¶ 7.394.

state or subject them to a different customs procedure, other than in exceptional circumstances.²⁴⁹

While the United States has based this item on violation of TRIPS (and not a utilitarian argument), the knowledge of the theoretical justification for the Trademark Law remains helpful for a reframing of the U.S. arguments, as the WTO Panel found in favor of both the United States and China on this item.²⁵⁰ While the WTO Panel found in favor of the United States by deciding that the “simple removal” of a counterfeited trademark was inconsistent with the fourth sentence of Article 46,²⁵¹ this finding is limited to auctions of products and not donations.²⁵² Donations of infringing products to charitable organizations make up the majority of disposal methods by China Customs.²⁵³ However, there is no requirement that China Customs ensure that such donations do not make their way into the stream of commerce,²⁵⁴ and this continues to be a way that infringing products can re-enter the marketplace.

The key to persuading China to change its laws, both the customs regulations and the Trademark Law, is to persuade them with arguments that resonate,²⁵⁵ such as social planning-based arguments. Currently, social planning theory requires that the manner in which could best redistribute the wealth and protect consumer safety should be used. In the case of infringing products where the infringing marks can be removed, this Chinese theory of trademark law is embedded into the policy and actions of China Customs, where the majority of the infringing goods are donated to social welfare organizations, with the goods to then be provided free of charge to those in need.²⁵⁶

In reframing the issue, the United States should focus on a consumer safety argument and question whether customs officers or other administrative authorities do a quality check on the products before releasing the infringing product back into the stream of commerce.²⁵⁷ It is unlikely that

249. TRIPS, *supra* note 8, art. 59.

250. See DS362 Panel Report, *supra* note 40, ¶7.395(b)–(c).

251. See *id.* ¶7.394.

252. See U.S.T.R. WTO Press Release, *supra* note 228.

253. See DS362 Panel Report, *supra* note 40, ¶7.349.

254. See *id.* ¶7.312 (“the United States has not established that . . . (b) Customs has a duty to carry out necessary supervision of such use . . .”).

255. See Sherwood, *supra* note 220, at 44.

256. See DS362 Panel Report, *supra* note 40, ¶7.349 (53.5 percent of all seized infringing goods are donated to social welfare bodies).

257. See First Submission of the United States of America, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 49, WT/DS362 (Jan. 30, 2008) [hereinafter *First U.S. Submission*]. While the *First U.S. Submission* points out that there is a concern for defective or dangerous products to be released back into the stream of commerce (either through the donation to charity or public auction), the United States does not elaborate on this important item. In addition, while the *Second U.S. Submission* elaborates

this can be done, given the magnitude of seized products. In addition, given the training of officers, one could not expect them to be able to assess the quality of each and every single type of product seized (especially products like pharmaceuticals). This could potentially put harmful products back into the hands of consumers, something that violates the consumer welfare goal of the Trademark Law.²⁵⁸

B. Second Application: Educate Chinese Lawmakers

Another practical application that can be implemented now is to better educate the Chinese lawmakers and other influencers. The Chinese freely admit that further inquiry into the theoretical bases for its intellectual property laws is needed.²⁵⁹ To date, Chinese lawmakers have been concerned with meeting international requirements, and appeasing the United States in its demands. Over the past twenty years or so, resources to devote to the study of the theoretical justifications of their laws have been scarce, as drafting and revising the text of the laws have been forefront.²⁶⁰ A step back from the textual revisions is needed to understand which policies the trademark laws currently promote and whether these should remain the focus, or whether there are other theories and policies that would work better.

This presents an opportunity for U.S. officials, businesses, and scholars to educate the Chinese lawmakers as to the social planning theory that is underlying the Chinese Trademark Law. Quasi-governmental entities and universities are already taking steps to provide education for members of the Chinese judiciary, legislators and other government officials.²⁶¹ Adding this element into already existing programs would

on the high potential for low-quality products to enter the stream of commerce, the United States focuses on the harm to the brand owner, not to the consumer. *See Second U.S. Submission*, *supra* note 234, at 39. Furthermore, it would appear that China has argued that Customs officers do have the ability to assess quality levels (*see id.* at 39 n.170, citing the First Written Submission of the People's Republic of China, ¶¶ 161–62, 173), but the United States has pointed out that the agreement between China and the Red Cross of China (one of the donees of seized goods) specifically states that China Customs is not responsible for the quality of the goods donated to the Red Cross, thus providing an acknowledgment of the potential for unsafe products to enter the stream of commerce. *Id.* However, the WTO Panel found the China Customs regulations were facially sufficient to ensure that defective or dangerous goods are not donated, *see* DS362 Panel Report, *supra* note 40, ¶¶ 7.290–.291, as the United States did not bring evidence or sufficient legal arguments to prove otherwise.

258. For an example of a successful outcome based on this type of consumer welfare argument, *see* Bird, *supra* note 240, at 357 (discussing the efforts by the Heinz Corporation, and highlighting the consumer welfare-based arguments made by Heinz in successfully combating counterfeit products).

259. *See supra* note 42.

260. *See* Maskus, Dougherty & Mertha, *supra* note 27, at 311.

261. *See supra* note 223 for a sample of the educational efforts by U.S. quasi-governmental entities and universities.

provide the Chinese audience with a view of the benefits and pitfalls that come from using a subjective theory to drive policy and law. While the subjectivity of social planning theory means that local circumstances can be taken into account to mold the laws to the particular situation, this same benefit can be a pitfall. In a country that is evolving towards a rule-of-law legal system,²⁶² the laws need to be explicit and applied as uniformly as possible. While a flexible approach may work for certain situations, the wide range of subjectivity in the current laws is detrimental, as it prevents uniform compliance with them. In addition, since social planning theory is, in some sense, a utopian model, such a theory cannot provide the answers for judges and practitioners in every situation.²⁶³ Under a social planning theory, there are a variety of differing interests which allow a judge who is sympathetic to a counterfeiter to set the amount of damages at far less than the trademark user suffered.²⁶⁴

The United States can and should educate Chinese policymakers and jurists about the benefits of other theories that may resonate with the Chinese, which includes increased trademark protection for both U.S. and Chinese businesses. For example, as more Chinese businesses gain a foothold into the consumer product market, they will want to protect their trademarks from infringement both in China and overseas. There will come a time when China is no longer one of the major hubs for manufacturing, and Chinese products may be manufactured abroad.²⁶⁵ Then, Chinese products will be imported back into China, thus bringing the problems that Europe and the United States face today—counterfeiting and gray market products. A different theory, such as a Lockean labor theory of trademark law²⁶⁶ might provide greater protection to Chinese trademark owners. Such a theory would allow Chinese trademark owners to stop the import of gray market goods, regulate how their trademarks are used in competitor advertisements and better fight counterfeiting at home and abroad. And perhaps when the Chinese economy is not so heavily regulated, utilitarianism may provide a workable alternative justification.

262. CHOW, *supra* note 46, at 64–65. Some commentators are skeptical of such transition happening in the near future. See, e.g., Jerome A. Cohen, Opinion, *A Just Legal System*, INT'L HERALD TRIB., Dec. 11, 2007, available at <http://www.iht.com/articles/2007/12/11/opinion/edcohen.php>.

263. Fisher, *Theories*, *supra* note 48, at 194.

264. See, e.g., *supra* note 206.

265. For example, Vietnam or Cambodia may eventually become the world's next manufacturing capitals. See James Fallows, *China Makes, the World Takes*, THE ATLANTIC (July/Aug. 2007), at 48.

266. Namely, that these Chinese businesses have invested a great deal of time and effort (not including money) into developing their trademarks. This would provide greater protection if such theory was adopted. See *supra* note 49 for a description of Locke's theory.

VI. CONCLUSION

With the 2008 Beijing Olympics, the world witnessed the monumental efforts of the Chinese government to enhance its protection of trademarks and other intellectual property rights.²⁶⁷ However, such efforts were focused only on the host cities,²⁶⁸ and if history can predict future behavior, once the spotlight and focus is shifted away from China, all will revert back to what it was before.²⁶⁹ The upcoming 2010 World Expo in Shanghai will provide another motivation for increased protection efforts, but again, such efforts will likely be focused only on the host city and be short-lived. Thus, places farther away from the large cities, where enhanced trademark protection is most needed, will not experience any changes.²⁷⁰ What will cause China to permanently change from a “pirate” to a “partner”?²⁷¹

One of the answers to this century-old question is to change how the United States approaches its strategy in attempting to influence change in China. Understanding the theory that drives the Trademark Law and the application thereof is the change needed and is the first step in improving the U.S. efforts in China. With this new theoretical understanding, the United States has the ability to reframe its negotiations with the Chinese perspective in mind. It is possible that, due to political reasons, arguments based on Chinese theoretical notions of trademark law may not find favor in U.S. policymaking, but if still studied and critiqued with proper perspective, they may nonetheless enhance understanding of the Trademark Law in the United States. This enhanced understanding will improve the discourse surrounding the areas of contention and perhaps provide pathways to a reconciliation of the conflict between the two countries. If such change does not occur, the United

267. As an example, the International Olympic Committee heralded China's efforts to curb pirating of the Olympic games. See *IOC Official Praises China Anti-Piracy Efforts*, XINHUA, Aug. 21, 2008, available at LEXIS (Xinhua General News Service File).

268. The Chinese government targeted only the Olympic games host cities of Beijing, Shanghai, Tianjin, Qingdao, Shenyang and Qinghuangdao, and publicly announced its requirement of “strict [intellectual property rights] protection during Olympic period.” *Strict IPR Protection*, *supra* note 41.

269. See, e.g., MERTHA, *supra* note 3, at 144.

270. See Yu, *China Puzzle*, *supra* note 88, at 192. See also Qishan, *supra* note 29 (using as examples the actions taken against the notorious counterfeit shopping centers only in Shanghai and Beijing).

271. Many commentators have suggested ways in which to convert China from a “pirate” country, meaning one that does not adhere to intellectual property protection, to a “partner” country. See generally ALFORD, *supra* note 68, at 95–111 (discussing the history of Taiwan in moving from a pirate to a “proprietor” as a way to better understand the process for China); Yu, *Pirates to Partners*, *supra* note 78, at 165–242 (providing a twelve-step action plan for the U.S. to better convert China from a pirate to a partner). Interestingly, it is often pointed out that the United States itself was only a convert in the last century or so.

States may experience yet another century of frustration and anger towards China. However, continued confrontation, without change, between the United States and China will not be productive, as it will not bring about sustained change.²⁷²

Moreover, an understanding can provide the United States with the ability to assist China with understanding its own theoretical justifications for the Trademark Law. With the new revisions to the Trademark Law and the increased focus of the Chinese government on intellectual property matters, the time is ripe for an internal education campaign to analyze and understand what has been effectively and implicitly adopted over the last two decades: a focus on the relevant welfare and distributive theories. By increasing awareness, the opportunity for debate as to whether welfare and distributive theories are truly the best drivers of the Trademark Law can flourish. In addition, with such open debate, all of China's jurists can finally be on the same page as to the scope and application of such theory to the Trademark Law and haphazard application of the law can be reduced. Making much ado about the Chinese theoretical justifications for its trademark laws benefits both China and the United States.

272. Traditional methods, such as economic pressures, have not worked over the past century. As such, non-traditional methods such as the one proposed by this Article and by other scholars (see, e.g., Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569 (2002) (arguing for the use of a dispute resolution approach to analyzing and resolving global intellectual property disputes)) are needed to promote sustained changes.

China's Competition Policy Reforms: The Antimonopoly Law and Beyond

Bruce M. Owen, Su Sun and Wentong Zheng*

Abstract

More than twelve years have elapsed since China began its efforts to enact a comprehensive antitrust law. Today, drafts of the law are still being debated, with no real signs of enactment. Such a protracted legislative process is highly unusual in China, and can only be explained by the controversy the draft law generates. After a brief review of China's current competition policy and the new draft antitrust law, this paper discusses the fundamental issues in China's economy that give rise to the challenges facing China's antitrust policymakers in enacting the new antitrust law. These issues include the role of state-owned enterprises, perceived excessive competition in China's economy, mergers and acquisitions by foreign companies, the treatment of administrative monopolies, and the enforcement of the antitrust law. While those controversies create significant policy issues for China, they do not constitute valid objections to the enactment of the new antitrust law. Meanwhile, it will be important for China to recognize that the new antitrust law alone will not be sufficient to fully realize its goal of promoting competition in its economy; other reforms will be necessary as well. China will be better off by moving swiftly to enact the new antitrust law, while keeping the momentum to engage in those other reforms.

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I. INTRODUCTION

The Supreme Court of the United States once characterized antitrust law as the “Magna Carta” of free enterprise.¹ By promoting free and fair competition, antitrust law has supported market economies in the West in several important ways. First, it promotes economic efficiency, by making sure that goods are made by the firm which can produce them at lowest cost, and that goods flow to those consumers who value the goods the most. Second, antitrust law seeks to protect customers, both individuals and businesses, against the creation and exercise of undue market power. Third, antitrust law is an aspect of broader competition policy, which seeks to promote private competitive markets as alternatives to state-owned monopolies or regulated monopolies.

For countries that had been operating under centrally planned economic systems, however, “competition” is an unfamiliar concept. In recent years, as more and more centrally-planned economies are making their transitions to market-oriented economies, attention is being paid to the importance of competition as an institution. As a result, those transitional economies are increasingly looking to the antitrust laws developed in Western countries for guidance in designing their competition policies.

As the largest and fastest-growing transitional economy in the world, China currently has many laws dealing with various aspects of antitrust issues. China’s current antitrust rules, however, are fragmented, and lack many essential components of what would be considered a complete set of antitrust policy tools. To address the shortcomings of its current antitrust rules, China in 1994 began its efforts to enact a comprehensive antitrust law, or the so-called Antimonopoly Law (“AML”). In recent years, numerous drafts of the AML have been circulated and commented on, and the draft AML has been placed on the legislative agenda of the National People’s Congress a number of times.

Yet today, more than twelve years later, drafts of the AML are still being debated, without any real signs of enactment. Such a protracted legislative process is highly unusual in China, where the law-making process is controlled largely by the government. In China, important legislation usually can be marshaled through the legislative process very quickly, once

¹ United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

the leadership reaches consensus on the legislation. The last time China had a prolonged legislative process for an important law was its drafting and enactment of the Securities Law in the 1990s. In the case of the Securities Law, it took China six years to complete the legislative process, and Chinese policymakers characterized the difficulties encountered in enacting the law as “unprecedented.”² In enacting the AML, China already spent twice amount the time it spent on enacting the Securities Law, and yet still sees no signs of enactment. Judging from China’s experience with the enactment of the Securities Law, the difficulties behind the AML can only be more substantial.

Many in the West may wonder what those difficulties are. Why is it taking China so long to reach a consensus on an antitrust law, a law considered so important in a market economy? This article aims to answer that question. As we will demonstrate below, the answer to that question lies not with the technical aspects of the antitrust issues commonly found in a mature market economy, but with the fundamental issues arising from China’s historic transformation from a centrally-planned economy to a market economy. Those issues include the role of the state-owned enterprises, perceived excessive competition, mergers and acquisitions by foreign companies, the treatment of administrative monopolies, and antitrust enforcement. Apparently it is those controversial issues—not the debates on the technicalities of the draft law—that are holding back the legislative process for the AML. However, as we will see in the discussions below, the resolution of those controversial issues needs not precede the adoption of the new antitrust law.

Meanwhile, due to China’s unique political, economic, and legal backgrounds, its goal of promoting competition will not be fully realized by using the AML alone. Other reforms, such as reforms of the state-owned enterprises and reforms aimed at limiting the role of the government in the economy, will also be important parts of China’s competition policy reforms.

² See, e.g., *Drafters of the Securities Law Speak on the “Blue Skies” Law*, SECURITIES DAILY, <http://business.sohu.com/2004/07/01/72/article220797217.shtml> (last visited March 28, 2007). China began drafting the Securities Law in 1992, two years after China’s first stock market opened in Shenzhen. During the following six years, numerous scholars and industry experts participated in the drafting process, and a total of several dozens of drafts were circulated internally. Intense debates focused on the relationship between China’s stock markets and China’s “socialist market economy,” the treatment of state-owned capital in the securities market, and the scope of securities regulations. It was not until 1998 that China settled on a final draft and enacted the Securities Law.

China should take an incremental approach and move swiftly to enact the AML, while keeping the momentum to actively engage in those related reforms.

This article is organized as follows. Section II presents a brief overview of China's current antitrust rules as well as a summary of the major components of the proposed AML. Section III discusses China's economic, regulatory, and legal contexts. Section IV focuses on the fundamental issues in China's economy that give rise to the challenges facing China's antitrust policymakers in enacting the AML. Section V concludes.

II. CHINA'S CURRENT AND PROPOSED ANTITRUST LAWS

A. China's Current Antitrust Rules

China's current competition policy is found in a number of specific laws and administrative rules. The most comprehensive of these is the Anti-Unfair Competition Law, promulgated in 1993.³ The Anti-Unfair Competition Law contains some provisions that are usually found in antitrust law, such as prohibition of tie-in sales in Article 12 and prohibition of price fixing and bid rigging in Article 15. But the Anti-Unfair Competition Law also addresses many other issues, including bribery, deceptive advertising, coercive sales, and appropriation of business secrets. To a large extent, the Anti-Unfair Competition Law is more like a consumer protection law than an antitrust law.

Antitrust provisions are also scattered in more specialized laws. For example, the Commercial Banking Law passed in 1995 includes an article that prohibits banks from engaging in "improper competition."⁴ The Price Law passed in 1997 has provisions against "improper pricing behaviors" including price fixing, predatory pricing and price discrimination, to name a

³ For the Chinese text of this law, see <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html> (last visited March 28, 2007). For the English text of this law, see <http://apecweb.apeccp.org.tw/doc/China/Competition/cncom2.html> (last visited March 28, 2007).

⁴ See Article 9 of the Commercial Banking Law, <http://www.pbc.gov.cn/rhwg/19981802.htm> (last visited March 28, 2007).

few.⁵ The Procurement and Bidding Law passed in 1999 prohibits bid rigging.⁶ Most recently, China has revised the 2001 Patent Law for the third time and provisions against patent abuse that excludes or restricts competition have been added under Chapter Six on compulsory licensing.⁷

More often, competition issues are directly addressed by the issuance of administrative rules and regulations. Sometimes administrative rules are used to address new issues that require a quick response. Other times they provide more detailed interpretations of previously promulgated laws. The following are some important administrative rules regarding competition issues:

- In 1993, the State Administration of Industry and Commerce (“SAIC”) issued Rules on Prohibiting Public Utility Companies from Restricting Competition,⁸ which was meant to reign in widespread abuse of monopoly positions by public utility companies.
- In April 2001, the State Council, China’s cabinet, issued the Rules on Prohibiting Regional Blockades in Market Economic Activities.⁹ This regulation deals with a major form of administrative monopoly where local government agencies deliberately discriminate against products and services provided by other localities and oftentimes simply deny them access to the local market.

⁵ See Article 14 of the Price Law, http://www.chinacourt.org/flwk/show1.php?file_id=29493&str1=%BC%DB%B8%F1%B7%A8 (last visited March 28, 2007).

⁶ See Article 32 of the Procurement and Bidding Law, <http://www.cin.gov.cn/law/main/1999092101.htm> (last visited March 28, 2007).

⁷ For China’s current Patent Law, see http://www.sipo.gov.cn/sipo/flfg/zlf/200608/t20060831_109702.htm (last visited March 28, 2007). The third revision is now under review at the State Council Legislative Affairs Office.

⁸ See Rules on Prohibiting Public Utility Companies from Restricting Competition, <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027927.html> (last visited March 28, 2007).

⁹ See Rules on Prohibiting Regional Blockades in Market Economic Activities, <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027985.html> (last visited March 28, 2007).

- Another regulation is the Provisional Rules on Prevention of Monopoly Pricing issued by the State Development and Reform Commission in 2003.¹⁰ The Rules prohibit the abuse of “market dominance” and infer dominance through “market share in the relevant market, substitutability of relevant goods, and ease of new entry.” The Rules also prohibit price coordination, supply restriction, bid rigging, vertical price restraint, below-cost-pricing and price discrimination as abuses of dominance. Finally, the Rules prohibit government agencies from “illegally intervening” in market price determinations.

These regulations generally do not have a clear and credible enforcement mechanism, and their implementation has been largely ineffective.

To address rising concerns about foreign acquisitions of Chinese companies, six government agencies jointly issued the Rules on Acquisitions of Domestic Enterprises by Foreign Investors (“M&A Rules”) in 2006.¹¹ Article 51 of the M&A Rules lays out the four conditions under which pre-merger notification to China’s Ministry of Commerce (“MOFCOM”) and the SAIC is required. The four conditions include thresholds that relate to annual sales, the number of enterprises the foreign party has previously acquired in related industries and the merging parties’ market shares. The M&A Rules, however, suffer from a number of deficiencies.¹²

To aid the implementation of the M&A Rules, in March, 2007, MOFCOM posted on its web site the Antitrust Filing Guidelines.¹³ The Guidelines in most part resemble similar

¹⁰ See Provisional Rules on Prevention of Monopoly Pricing, <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300028008.html> (last visited March 28, 2007).

¹¹ See Rules on Acquisition of Domestic Enterprises by Foreign Investors, <http://www.xasmw.com/rule/content.asp?id=254> (last visited March 28, 2007). A Provisional Rule that had essentially the same content on antitrust review was issued in 2003. See Provisional Rules on Acquisition of Domestic Enterprises by Foreign Investors, <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200509/20050900366385.html> (last visited March 28, 2007).

¹² For a brief discussion of some of the problems in the M&A Rules, see Su Sun, *Antitrust Review in China’s New Merger Regulation*, ECONOMISTS INK, Winter 2007.

¹³ See Antitrust Filing Guidelines, <http://tfs.mofcom.gov.cn/aarticle/bb/200703/20070304440611.html> (last visited March 28, 2007).

guidelines and procedures adopted by other jurisdictions and are helpful for parties who wish to understand when and what to file. However, the filing requirements in the Guidelines seem to be overly burdensome to merging parties.¹⁴

B. China's Proposed Antimonopoly Law

As can be seen from the discussion above, China's current laws and regulations dealing with antitrust-related issues are fragmented. Oftentimes, provisions of those laws and regulations are vague and repetitive, and the effectiveness of antitrust enforcement is greatly reduced by the existence of multiple enforcement agencies authorized by different laws. In part as a response to the perceived shortcomings of China's current antitrust rules, China has been trying to enact a comprehensive antitrust law, the Antimonopoly Law ("AML"), to consolidate the antitrust provisions into a uniform set of rules.

The drafting of the AML started in 1994, soon after the 1993 Anti-Unfair Competition Law was promulgated. Two government agencies, the State Economic and Trade Commission ("SETC") and the SAIC were in charge of the drafting. The SETC was abolished in a government restructuring in 2003 and MOFCOM has since taken its place as the main drafter of the AML.¹⁵ By 2002, a draft had taken shape and soon began circulating in small circles for comment. The next couple years saw a number of revisions. In March 2004, a draft was submitted to the State Council Legislative Affairs Office for review. After several more revisions, a draft was submitted to the National People's Congress ("NPC") Standing Committee for review in June 2006. So far, the NPC Standing Committee has done the first reading¹⁶ and more readings are expected later this year.

¹⁴ The ABA Antitrust Section and International Section have made detailed comments on the Guidelines. *See* http://meetings.abanet.org/webupload/commupload/IC860000/newsletterpubs/abaprcforeignm&a_filingguidelinescommentsfinalcombo.pdf (last visited March 28, 2007).

¹⁵ *See* Ming Shang, *China's Competition Policy and Legislation in Development*, April 22, 2005, <http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200504/20050400081489.html> (last visited March 28, 2007).

¹⁶ The NPC Standing Committee members have made a number of comments on this draft during their first review. *See*

The AML drafting process, though not public and transparent, did involve a small circle of experts and practitioners, both from China and from other parts of the world. Seminars and conferences were held in China and in other jurisdictions including the U.S. and Europe. Foreign enforcement officials, scholars and practicing attorneys frequently spoke at seminars and conferences and commented on the drafts. The ABA alone made several rounds of comments on different drafts of the AML.¹⁷ The various revisions of the draft AML appear to have incorporated comments made by various parties. Through these many rounds of comments and revisions, the draft AML has been improved substantially, and Chinese government officials also seem to have gained more knowledge and better understanding about competition issues generally.

The current draft of the AML, released in June 2006, consists of eight chapters.¹⁸ Chapter one describes the general principles of the AML, including objectives, applicability and coverage. Chapter Two describes which monopoly agreements are prohibited and which are exempted. Chapter Three prohibits the abuse of market dominant position. It provides methods to infer dominance and describes abusive behaviors. Chapter Four provides for agency review of proposed mergers, acquisitions, and joint ventures, specifying the notification thresholds and exemptions, required documents, and review procedures. Chapter Five is devoted to prohibitions of anticompetitive activity by government agencies. This chapter incorporates some of the prior administrative rules and focuses in particular on various forms of local protectionism. Chapter

<http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXYZLK&id=350218&pdm=110106> (last visited March 28, 2007).

¹⁷ See *Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China*, July 15, 2003, <http://www.abanet.org/antitrust/at-comments/2003/07-03/jointsubmission.pdf> (last visited March 28, 2007); *Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China*, May, 2005, <http://www.abanet.org/antitrust/comments/2005/05-05/commentsprc2005woapp.pdf>; and the *July 2005 Supplement*, <http://www.abanet.org/antitrust/comments/2005/07-05/abaprcat2005-2final.pdf> (last visited March 28, 2007).

¹⁸ We have made detailed comments on a similar earlier draft of AML previously. See Bruce Owen, Su Sun & Wentong Zheng, *Antitrust in China: The Problem of Incentive Compatibility*, 1 JOURNAL OF COMPETITION LAW AND ECONOMICS 123-48 (2005). We are also in agreement with much of the commentaries on the draft law undertaken by the American Bar Association.

Six proposes two enforcement authorities: an Antimonopoly Enforcement Agency that issues guidelines, reviews merger notifications, and investigates suspected anticompetitive behavior in the marketplace, and an Antimonopoly Commission at the cabinet level that conducts policy research, oversees the work of the Antimonopoly Enforcement Agency, and coordinates work among other regulatory agencies and on major cases. Chapter Seven describes liability and penalties for violating the AML. This chapter also provides reduced penalties for voluntarily assisting the enforcement authority's investigation in monopolistic agreement cases. The last Chapter states that trade associations are subject to the AML, agricultural activities are generally exempted, and an intellectual property right is not to be regarded as a per se unlawful monopoly but the abuse of such rights to restrict competition is subject to the AML.

III. CHINA'S ECONOMIC, REGULATORY, AND LEGAL CONTEXTS

Before we turn to the fundamental issues giving rise to the challenges facing China's antitrust policymakers in enacting the AML, a brief discussion of China's economic, regulatory, and legal contexts in which those issues arise is in order.¹⁹ The formulation of competition policy in a country does not happen in vacuum; instead, it is closely tied to the economic, political, and legal contexts of the country. This is particularly so in China, as the AML is being drafted against the backdrop of China's historic transformation from a centrally planned economy to a market economy.

A. China's Economic Context

When economic reforms started in 1978, China's economy was dominated by the state, and private enterprises played only a negligible role. With factories essentially being units of the state productive machinery, there was little role for competition. At times the government promoted "labor competition" among factories or production units in an effort to indoctrinate the populace with communist ideology, but competition motivated by profits was condemned as a symptom of corrupt capitalist systems.

¹⁹ A somewhat more detailed but less updated discussion can be found in Owen, Sun & Zheng, *id.*

In 1992, China significantly accelerated its pace of economic reform after the inspection tour of the southern regions by its paramount leader, Deng Xiaoping. In the fall of 1992, the 14th Congress of the Chinese Communist Party officially declared that the central goal of China's economic reform is to establish a "socialist market economy." In the following decade, far-reaching reform measures were undertaken to overhaul China's SOE sector, taxation, banking, and foreign currency systems. Private enterprises grew rapidly, and large amounts of foreign investment flowed in.

Now, nearly thirty years after the start of economic reform in 1978, China's economic structures have undergone dramatic changes. One of the most significant changes is the decline of the importance of the SOEs and other state-controlled enterprises and the emergence of the country's private sector. According to a national census on the composition of China's economic entities completed in 2003, among three million enterprises that existed on December 31, 2001, SOEs and enterprises with a controlling share held by the State accounted for 56.2 percent of capital invested and 49.6 percent of annual revenue.²⁰ Anecdotal evidence indicates that since 2001, further economic reform has lowered the share of SOEs in China's economy to about one-third.²¹ This is a remarkable contrast with 1978, when all enterprises were state-owned.

Despite the increasingly important role of the private sector in China's economy, private enterprises in China are mostly small in size. In fact, 99 percent of the enterprises in China are small or medium size, with most of them funded by private investment.²² According to government statistics, by the end of 2003, China's small and medium sized enterprises consisted of 55.6 percent of the country's GDP, 74.7 percent of industrial production value added, 58.9 percent of retail sales, 46.2 percent of tax revenues and 62.3 percent of exports.²³ Nevertheless,

²⁰ See State Bureau of Statistics, *Report on the Second National Census on Basic Economic Entities*, January 17, 2003, http://www.stats.gov.cn/tjgb/jbdwpcgb/qgjbdwpcgb/t20030117_61467.htm (last visited March 28, 2007).

²¹ See Yingqiu Liu, *The General Trends and Problems of China's Private Economic Sectors*, JOURNAL OF CHINESE ACADEMY OF SOCIAL SCIENCES, June, 2006, <http://www.cpes.cass.cn/viewInfo.asp?id=351> (last visited March 28, 2007).

²² See *id.*

²³ See *Non-public Economy Blooming in China*, PEOPLE'S DAILY ONLINE, http://english.people.com.cn/200407/28/eng20040728_151132.html (last updated July 28, 2004).

SOEs remain the largest enterprises in China, largely concentrated in important industries such as electricity, petroleum, railroads, aviation, telecommunications, and banking.

B. China's Regulatory Context

At the same time that China's economic structure is undergoing fundamental changes, the regulatory structure of China is also being transformed to one more compatible with the requirements of a market economy. Before China's economic reforms, China's economic system was modelled after that of the former Soviet Union. For almost every major industry, a corresponding ministry existed within the government to control, manage, and coordinate the production in that industry. There was no need for government "regulation," as the word is used in the Western countries; the industries were already directly owned and managed by the state. It is when China began to reduce central direction of its economy after the commencement of its economic reforms that China faced the question of what industries to regulate, and how.

Realizing the problems associated with undue government intervention in the economy, the Chinese government has made a strategic choice to retreat from such "non-essential" industries as machinery, electronics, chemicals, and textiles. Those industries do not tend to create conditions of "natural monopoly," do not impinge upon national security and public goods, and usually are not regulated in market economies. In several rounds of government restructuring since 1978, China has gradually dissolved the government ministries overseeing those industries and has replaced them with so-called "chambers of commerce" or "industrial associations" representing and coordinating various interests in those industries.²⁴

In industries considered key to China's national security and economic development, such as electricity, petroleum, banking, insurance, railroads, and aviation, the Chinese government has chosen to retain or strengthen its dominant roles. In those key industries, the dominant firms remain mostly state-owned. As a result, the government plays two roles: it is both the owner of the major players and the referee, i.e., the regulator. This double-role is now seen as detrimental to the development of China's market economy. Among the steps that have

²⁴ Leiming Wang, Lutao Shen & Sheng Zou, *Five Comprehensive Government Restructures 1982-2003*, Xinhua News Agency (Mar. 6, 2003), <http://www.people.com.cn/GB/shizheng/252/10434/10435/20030306/937651.html> (last visited March 28, 2007).

been taken to address this problem, the foremost has been to establish separate regulatory agencies for the key industries and to strip the SOEs in those industries of the regulatory power bestowed upon them in the planned-economy era. In so doing, the Chinese government hopes to separate the government's functions as a player and as a regulator. For example, between 1998 and 2004, China established the Insurance Regulatory Commission, the Banking Regulatory Commission, and the Electric Power Regulatory Commission, which are charged with overseeing the insurance, banking, and electricity industries, respectively. The largest enterprises in those three industries, all state-owned, along with enterprises of other ownership forms that may emerge in the future, are subject to regulation by those new agencies. Furthermore, to strengthen government control over SOEs in key industries and to stop the rapid loss of state assets, China in 2003 established the State Assets Management Commission to oversee the operation of state-owned assets by SOEs.

C. China's Legal Context

As China's economy is being transformed from a centrally-planned one to a market-oriented one, China's legal system is undergoing changes accordingly. The focus of China's legislative in most of the past thirty years has been on economic laws, most notably contract law, bankruptcy law, corporate law, foreign investment law, securities law, and the like. The AML is another example of China's efforts to guide economic behaviors by reliance on well-defined rules of economic law.

Although China has enacted many much-needed economic laws, the enforcement of such laws oftentimes is less than satisfactory. Various government agencies charged with implementing the government's regulatory policies have the authority to enforce economic statutes and regulations in their respective areas. Similarly, enforcement of the AML will be carried out by the Antimonopoly Enforcement Agency, an administrative agency. However, enforcement by administrative agencies in China in many cases is not transparent or predictable. First, the rule making processes at the administrative agencies are not subject to uniform standards, as China has yet to have a law specifying the procedures administrative agencies are required to follow when making regulations.²⁵ Second, the actions by administrative agencies

²⁵ However, efforts to adopt an administrative procedure law have been underway since 2002.

are now subject to judicial review by the People's Courts, thanks to China's enactment of the Administrative Litigation Law in 1989. The quality of the judicial review provided by the Administrative Litigation Law, however, is quite limited. Among the problems with judicial review of administrative actions most cited by commentators are the narrow scope and convoluted procedures of the review, and the persistent bias in favor of government agencies.²⁶

The People's Courts have problems of their own keeping up with the demands placed on them by China's burgeoning economy. Although the Chinese Constitution states that the People's Courts shall exercise their judicial power independently, in practice there is no institutional guarantee of judicial independence. Further complicating the matter is the poor quality of the judges. Until recently, a large portion of Chinese judges had been selected from retired military officers. Those judges generally have no legal training or experience, and are ill-equipped to handle complicated cases. Although in recent years the overall quality of Chinese judges has been improving, it remains in doubt whether Chinese judges, most of whom are not trained in economics, will be competent to handle antitrust cases to be brought under the proposed AML. Finally, the lack of *stare decisis* in China will also reduce the effectiveness of the judicial interpretation of the AML. China's civil law tradition leaves no place for "judge-made" law. Although the Supreme People's Court has the power to interpret laws as they arise from legal cases, its legal interpretation cannot be cited by other courts and does not serve the function of precedents as it would in common law countries. This means that potential litigants cannot base expectations of what courts will do under a particular factual circumstance on prior decisions under similar circumstances. Indeed, there is no mechanism for doing so—judges in China generally do not write detailed opinions that are published. Expectations about the behavior of courts are thus difficult to form.

IV. FUNDAMENTAL ISSUES IN CHINA'S COMPETITION POLICY REFORMS

As we will see below, the most significant competition policy issues in China are inextricably tied to the fundamental issues arising from China's historic transformation from a

²⁶ For more details on China's judicial review of administrative actions, see Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PACIFIC LAW & POLICY JOURNAL 9 (June 2003).

centrally-planned economy to a market economy. It is those underlying issues, such as the role of state-owned enterprises, perceived excessive competition in China's economy, mergers and acquisitions by foreign companies, the treatment of administrative monopolies, and the enforcement of the antitrust law, that pose the most significant challenges to China's antitrust policymakers in enacting the AML. It is also those fundamental issues—and China's responses to them—that will define the parameters of China's future competition policies.

A. The Role of State-Owned Enterprises

The primary goal of the antitrust law is to encourage competition. It is the lack of competition in China's economy in general and in the state-owned sectors in particular that prompted China to start its efforts to enact a comprehensive antitrust law in the first place. However, as China has also sought to strengthen the role of SOEs in certain key sectors in recent years, how to bring the SOEs in those sectors into the framework to be established by the new antitrust law seems to have posed a challenge to China's antitrust policymakers.

As noted above, when China first embarked on economic reforms in 1978, almost all of the economic entities in China's economy were SOEs. By the early 1990s, despite the significant progress China had made in other aspects of the reforms, SOEs still accounted for an overwhelming percentage of China's economy. In almost every sector, market entry was tightly controlled by the government and consumers were left with no meaningful choices but to patronize state-approved SOEs, leaving those SOEs with what many consider undeservedly high profits. Complaints about the abuse by SOEs of their market power abounded. It is perhaps not a coincidence that soon after China decided to accelerate the market-oriented reforms in 1992, in 1994 China started the legislating process for its first comprehensive antitrust law.

Since the early 1990s, when China was beginning its efforts to enact a comprehensive antitrust law, it also implemented various *ad hoc* measures aimed at introducing more competition into the stagnant sectors controlled by SOEs. The government, as owner of the SOEs, broke up many SOEs into multiple entities intended to compete with each other. The restructuring of China's telecommunication industry serves as an example. Before 1994, China's telecommunication industry was monopolized by China Telecom. In 1994, the Chinese government formed China Unicom, a telecommunication provider that was chartered to compete with China Telecom in mobile phone and pager services. In 1999, China Telecom was broken

up into two separate entities: China Mobile that provided mobile phone services and a new China Telecom that provided landline services. In the same year, the Chinese government issued landline licenses to several newly formed companies to compete with the newly formed China Telecom. In the next round of restructuring in 2002, China Telecom was further divided and integrated with other telecommunication companies to form two “competing” landline providers: China Netcom based in Northern China and China Telecom based in Southern China.

Although those *ad hoc* competition-enhancing measures were successful in breaking up *de facto* monopolies, the competition they introduced is often very limited. The telecommunications industry again is an example. The two landline providers created by the government in 2002, China Netcom and China Telecom, are based in mutually exclusive territories. And in February 2007, the two companies signed an agreement not to compete for landline customers in the other’s territory.²⁷

While China has taken action to reduce the role of SOEs in most economic sectors, in certain sectors deemed to be of strategic importance to China’s economy, the control by SOEs is still very significant, and in many cases has even increased. As of 2006, eighty percent of the assets controlled by SOEs were concentrated in eight “strategic sectors” such as petroleum and electricity generation. SOEs accounted for almost all of the production of petroleum, natural gas, and ethylene, provided all of the basic telecommunication services, generated approximately fifty-five percent of electricity, and flew about eighty-two percent of passengers and cargo through the country’s air transportation system.²⁸

Indeed, at the same time that China is drafting the new antitrust law, China has made it a stated goal to maintain the dominant role of SOEs in certain sectors. On December 18, 2006, the State Assets Management Commission announced that seven “strategic” industries, including national defense, electrical power generation and grids, petroleum and petro-chemicals, telecommunications, coal, civil aviation, and waterway transportation, will be controlled by

27 See *China Telecom and China Netcom Reaching Agreement Not to Compete for Landline Customers*, BEIJING MORNING DAILY, February 27, 2007, <http://tech.sina.com.cn/t/2007-02-27/01011391578.shtml> (last visited March 28, 2007).

28 See *Breaking Up Monopolies Key to the Restructuring of SOEs*, LIAOWANG, December 13, 2006, http://news.xinhuanet.com/politics/2006-12/13/content_5480196.htm (last visited March 28, 2007).

SOEs.²⁹ The government will aim to increase the state capital infusion in those seven industries, and will seek to maintain “absolute control” of them by SOEs.³⁰ The State Assets Management Commission also announced that it is China’s goal to foster thirty to fifty large “internationally competitive” SOEs in those industries by the year of 2010.³¹ In other important industries (but less important than the seven strategic industries), including automobile, steel, and technology, the government will seek to maintain “somewhat strong influence” by state capital on the leading companies.³²

So how does China’s desire to promote SOEs in strategic and other important sectors fit into its overall antitrust scheme? In particular, will China’s professed goal of forming conglomerate SOEs in certain strategic sectors run afoul of the antitrust law, which, according to the latest draft, will outlaw the abuse of market power by monopolies, regardless of ownership status and sectors? How to reconcile these two seemingly contradictory goals—encouraging competition on one hand and maintaining control by SOEs on the other—is a challenge to China’s policymakers and is likely to have contributed to the prolonged debate on the draft antitrust law.

But in truth it is not at all clear whether China needs to maintain strong controls by SOEs in what it considers to be strategic or important economic sectors. At least one prominent economist has pointed out that the purpose of such state ownership in those sectors can be equally accomplished by strict government regulations and strict law enforcement.³³ But even if China has reasons to believe that state ownership is necessary, that is not necessarily incompatible with encouraging competition. After all, for most industries, China’s goal is only

29 See State Assets Commission, *Guidance on the Restructuring of State Capital and State Owned Enterprises*, December 18, 2006, <http://finance.sina.com.cn/g/20061218/11133173443.shtml> (last visited March 28, 2007); see also *SOEs to Maintain Overwhelming Control in Seven Sectors*, XINHUA NET, December 19, 2006, http://news.xinhuanet.com/fortune/2006-12/19/content_5504591.htm (last visited March 28, 2007).

30 See *id.*

31 See *id.*

32 See *id.*

33 See Lawrence Lau, *The Dual Dilemmas of SOE Reforms*, CAIJING MAGAZINE, December 4, 2005, <http://www.e-economic.com/info/4495-1.htm> (last visited March 28, 2007).

to maintain state ownership of the companies, but not to confer monopoly status on any particular company or group of companies. It is entirely possible to have state ownership of the companies in one sector, and yet to have that state ownership distributed in dozens, or even hundreds of SOEs competing against each other and against private firms.³⁴

In some sense, this approach—maintaining state ownership yet allowing more competition—is the approach China has taken already with respect to certain sectors. One example is the restructuring of the telecommunications industry, i.e., breaking up an existing SOE monopoly into multiple SOEs and thus introducing more competition. In addition, China has also taken steps to allow private enterprises to enter sectors that were previously off limits to them. On February 25, 2005, China’s State Council promulgated the *Opinions on Encouraging, Supporting, and Guiding the Development of Private Capital and Other Non State-Owned Capital* (“*Opinions*”).³⁵ The *Opinions* specifically allowed private capital to enter sectors such as electricity, telecommunications, railroad, civil aviation, petroleum, public utilities, financial services, social services, and national defence. More importantly, the *Opinions* allowed market entry by private enterprises as long as such entry is not expressly prohibited by the law, and allowed market entry by domestic private enterprises if foreign investors are allowed such entry.

China’s efforts to introduce more competition in sectors previously monopolized by SOEs and to open up more sectors to private enterprises have yielded some successes. In the civil aviation industry, for example, four private airlines have come into operation since 2005.³⁶ In the telecommunications industry, one private company has been allowed to provide call center services.³⁷

³⁴ However, some argue that SOEs may have stronger incentives to act anticompetitively. See David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST LAW JOURNAL 479-523 (2003). For SOEs to compete efficiently, competition must be an explicit goal of the government as equity owner in the firms.

³⁵ State Council Doc. No. [2005]3, February 25, 2005, available at <http://www.china.org.cn/chinese/PI-c/795128.htm> (last visited March 12, 2007).

³⁶ The four private airlines are Aokai Airlines, based in Tianjin; Chunqiu Airlines, based in Shanghai; Yinglian Airlines, based in Chengdu, Sichuan Province; and Dongxing Airlines, based in Wuhan, Hubei Province.

³⁷ The private company that was allowed to provide call center services was *Dongxing Guolu*.

These successes notwithstanding, China still has a long way to go in terms of promoting competition in the sectors controlled by SOEs. Although some of those sectors have seen an increase in the level of competition, the competition thus introduced is very often very limited and the consumers are still all too often left at the whim of the SOEs. Subjecting the SOEs in most sectors—particularly in those sectors the government has already allowed foreign and private investors to enter—to the new antitrust law and thus putting those SOEs on the same footing with other companies will best serve China’s goal of encouraging competition. And as analyzed above, this goal of encouraging competition is not necessarily incompatible with China’s goal of maintaining a strong presence by SOEs in certain sectors, provided that China structure the SOEs in ways that ensure both state ownership and competition.

Meanwhile, in the “strategic” sectors where China has vowed to promote the formation of conglomerate SOEs that can compete internationally, the AML does not necessarily pose a hurdle either. Many of those “strategic” sectors, such as electricity and telecommunications, are sectors where what economists call “natural monopoly” may arise and China could, as many developed countries do, opt for direct regulation of those sectors and grant some sort of antitrust immunity to those sectors.³⁸ Furthermore, even if China were to decide to grant some sort of exclusive status—and thus market power—to the key SOEs in the strategic sectors, such a decision needs not be a license for the SOEs to *abuse* the market power thus granted. In any event, China’s alleged need to have absolute control by SOEs in certain strategic sectors does not provide an excuse for not enacting the antitrust law.

Finally, it is worth noting that although the new antitrust law could play an important role in opening up many of the sectors currently monopolized by SOEs to new competition, it alone would not be sufficient for China to achieve that goal. First, even if SOEs were to be subject to the new antitrust law, the response to market competition by SOEs depends on the other aspects of SOE reforms, particularly the reforms of SOE ownership structures and the SOE management. Second, the lack of competition in SOE-controlled sectors to a large degree is caused by the tight control of market entry by the government. A more effective way of promoting competition,

³⁸ For example, the federal law of the United States to various degrees grants antitrust immunity to some regulated industries such as insurance, railroad, and ocean transportation, although these exemptions are often criticized. In addition, most developed countries now regard telecommunications services and large parts of the electricity sector as potentially competitive.

therefore, is for the government to relax its control on market entry. It is unclear whether the new antitrust law could compel the government to permit more market entry—presumably through its prohibition of “administrative monopolies,” a subject we will return to in section IV.D below. But in any event, the problem of market entry can be solved by the government undertaking self-initiated market entry liberalization measures, of which the *Opinions* in 2005 is a notable example. Finally, since the government is the ultimate owner of the SOEs and could restructure the SOEs as it chooses, another effective way of promoting competition is for the government to break up the monopolistic SOEs, without resorting to the new antitrust law, just as it did in the restructuring of the telecommunications industry.

B. “Excessive” Competition

In recent years, at the same time that China is trying to curb the monopolistic abuses of SOEs, China’s policymakers are increasingly concerned about a new threat—the threat of “excessive” or “malignant” competition in many sectors. To many, this contrast is perplexing. It seems to have created another challenge for Chinese policymakers as they ponder how to deal with two problems that pull in opposite directions.

So-called “excessive competition” is widespread in China. A Google search on the Chinese internet using the Chinese characters for “excessive competition” yielded approximately one million hits, most of which are press reports of the intense competition in various industries. The industries covered in those press reports are diverse, including software, foods, travel agencies, household appliances, telecommunications, maritime shipping, pharmaceuticals, insurance, banking, waste recycling, machinery, mortgage, motor vehicles, periodicals, supermarkets, internet services, steel, textile and apparels, and even lotteries. The most egregious examples of “malignant competition” reported by the Chinese media are the following:

- China’s Central TV reported in September 2006 that in the maritime shipping industry that operates between Shanghai and Japan, the level of competition among the shippers reached a point where the shippers incurred losses of \$210 per

smaller container and \$420 per bigger container. That translates into a loss of \$760,000 per week for an average shipper.³⁹

- In recent years, the competition among China's producers of dairy products has been so intense that many of them resort to illegal means of cutting costs, resulting in scandalous incidents such as poisonous, recycled, and contaminated milk.⁴⁰
- In China's household appliances industry, there is a widespread practice of engaging in libellous advertisement against competitors in the media to gain market shares.⁴¹
- In China's travel agency industry, it is not uncommon to have "zero" or even "negative" fees for tours, meaning that many travel agencies are paying customers to take tours with them.⁴²
- "Malignant competition" manifests itself not only in China's domestic industries, but also in the country's export sector. In recent years, Chinese products have been the number one targets of antidumping investigations initiated by members of the WTO. Many industry experts and top officials in China blame the excessive competition among China's exporters for this situation.⁴³

Needless to say, "excessive competition" has become a major perceived problem in the Chinese economy. Some policymakers believe that most of China's industries, except those

³⁹ *Malignant Competition Among SOEs in Shanghai's Maritime Shipping Industry*, <http://news.tom.com/2006-09-22/0016/78319004.html> (last visited March 28, 2007).

⁴⁰ *Diary Companies' Trust Crisis*, ECONOMIC REFERENCE NEWSPAPER, July 31, 2005, <http://chanye.finance.sina.com.cn/sp/2005-07-13/256435.shtml> (last visited March 28, 2007).

⁴¹ Ge Ling, *Malignant Competition Rampant in China's Household Appliances Industry*, PEOPLE'S DAILY ONLINE, <http://homea.people.com.cn/GB/41394/3379837.html> (last visited March 28, 2007).

⁴² *Low Price Competition, Malicious Cycle: What China's 10,000 Travel Agencies Should Do?* XINHUA NET, <http://www.ln.xinhuanet.com/wangtan/djjz/lxsdjjz.htm> (last visited March 28, 2007). This may result from competing away of payments from airlines, tour operators, and others to the agencies.

⁴³ See, e.g., Long Yongtu: *Excessive Competition Among Domestic Companies the Root Cause of Antidumping Cases*, <http://finance.anhuinews.com/system/2005/06/13/001282695.shtml> (last visited March 28, 2007).

industries in which the government deliberately maintains monopolies by SOEs—are characterized by “excessive competition.”⁴⁴

Partly in consequence of perceptions of “excessive” competition in recent years, the government has taken some measures to rein in “excessive competition.” Most of those measures involve what is called “industrial self-disciplines,” adopted under the direct supervision of the government. Under the practice of “industrial self-disciplines,” the major companies in an industry reach price agreements or other agreements to limit competition, in an effort to stabilize the market.⁴⁵ The “chambers of commerce” that were converted from government ministries played important roles in the adoption of those “industrial self-disciplines.” Indeed, this practice was officially sanctioned by the government in 1998.⁴⁶ These efforts mirror the experience of the United States’ during the Great Depression, when it was widely believed that excessive competition was responsible for deflationary price pressures and unemployment. At that time, the Roosevelt Administration made various attempts to limit price competition. These policies are now seen as unsound—they were harmful to consumers and probably prolonged the depression, which was not caused by “excessive” competition.

Meanwhile, the government has also stepped up its efforts to limit the competition among China’s exporters to reduce their exposure to antidumping investigations by foreign governments. For instance, in 2003 the government imposed an “advance approval” requirement for the export of thirty-six goods.⁴⁷ Under the requirement, exporters must first submit their

⁴⁴ See *Selected Comments on the Draft AML*, NPC Standing Committee, June 30, 2006, <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXLK&id=350218&pdmc=110106> (last visited March 28, 2007).

⁴⁵ For example, faced with growing inventory and price drops, China’s nine TV producers held a meeting in southern China in June 2000 to limit TV production and fix prices. The attempted price cartel was not successful, however.

⁴⁶ See State Economic and Trade Commission (“SETC”), *Opinions on Self-Disciplinary Prices Adopted by Some Industries*, August 17, 1998, <http://www.law999.net/law/doc/c001/1998/08/17/00107286.html> (last visited March 28, 2007). Ironically, before its abolition in the 2003 government restructuring, the SETC was one of a few government agencies in charge of drafting the AML.

⁴⁷ See MOFCOM and Customs Authority Circular 36 of 2003, *Advance Approval Requirement for the Export of Thirty-Six Goods*, November 29, 2003, <http://www1.customs.gov.cn/Default.aspx?TabID=433&InfoID=11070&SettingModuleID=1427> (last visited March 28, 2007).

export contracts to the respective chambers of commerce for approval prior to export. It is immediately obvious to a student of antitrust that policies such as the “industrial self-disciplines” and “advance approval” to a large degree function as government-sponsored price cartels. However, in implementing those policies, the government apparently did not seem to be concerned about their antitrust implications.⁴⁸

In the face of widespread “excessive competition,” some of China’s policymakers have questioned whether China needs to have an antitrust law when the competition in most sectors of China’s economy is already “excessive.”⁴⁹ To many, China’s problem is not that there is too little competition, but that there is too much. What China needs, they believe, is to consolidate the smaller companies into bigger and stronger ones that can compete in the international markets.⁵⁰

Although “excessive competition” exists in China’s economy, the implication seen by some policymakers—that China may not need the proposed antitrust law—is misguided. The term “excessive competition” is a misnomer. Competition of the kind the antitrust law is intended to promote can never be “excessive.” Most examples of “excessive competition” found in China’s economy are not examples of there being too much competition; rather, they are examples of competition going awry. Common to almost all those examples of “excessive competition” is the fact that the competitors have engaged in illegal or even criminal acts that violate the existing competition laws, product safety laws and consumer protection laws or would have violated the new antitrust law were it in effect today. The fact that such practices are widespread in China only underscores, rather than detracts from, China’s need to strictly enforce the existing laws and to enact the proposed antitrust law. Only through effective enforcement of such laws can competition be channelled to deliver maximum benefits to consumers.

Therefore, in sectors where “excessive competition” exists, China’s problem is not that there is too much competition, but that such competition is carried out in a less-than-ideal

⁴⁸ Ironically, the antitrust problems associated with those competition-limiting policies were perhaps first brought to the attention of the Chinese policymakers by three antitrust lawsuits filed in the United States in 2005 and 2006 alleging price fixings by Chinese exporters of Vitamin C, magnesite, and bauxite .

⁴⁹ *See supra* note 44.

⁵⁰ *See, e.g.,* comments by Mr. Zheng Gongcheng, *supra* note 44.

manner, thanks to the absence or lax enforcement of relevant laws, or to market imperfections that undermine the beneficial effects of competition. Competition itself should always be welcomed, especially when it is not good for competitors. This has been a hard-learned lesson for many developed countries. The United States, for example, at one point wondered whether it should strictly enforce its antitrust laws during the Great Depression, when (as noted above) increasing competition and falling prices were causing widespread distresses in its economy.⁵¹ Fortunately, the U.S. Supreme Court eventually held the line.⁵²

In sum, in addressing the “excessive competition” prevalent in its economy, China should focus on ways to change the way competition is carried out, not ways to limit competition itself. “Excessive competition” in any event does not constitute a reason for not enacting the proposed AML. Instead, the proposed AML will be an important addition to China’s toolkit as it tries to promote competition that benefits consumers.

Finally, it will be important for China’s policymakers to keep in mind that in addition to strictly enforcing the antitrust laws, broader reforms will be needed to address the root causes of “excessive competition.” First, additional SOE reforms will likely have significant impacts on reducing the disruptive competition that in many cases amounts to predatory pricing. It has been noted that China’s SOEs are the driving forces behind many of the most notorious examples of “excessive competition,” due to their abilities to absorb unlimited losses that purely commercial entities would not be willing or have the ability to absorb. For instance, in the Shanghai maritime shipping example cited above, the Chinese media have noted that all of the firms remaining in the industry are SOEs.⁵³ Second, Chinese companies have been overly relying on

⁵¹ Similarly, Article 10 of the current draft of the AML exempts agreements among competitors to resolve slow sales and large inventories during economic downturns.

⁵² The U.S. practice had been treating price fixing agreements as *per se* illegal under the Sherman Act. In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), however, the U.S. Supreme Court held that the creation of an exclusive joint selling agency by 137 Appalachian producers of bituminous coal was reasonable and therefore did not violate the Sherman Act. In so holding, the U.S. Supreme Court was greatly influenced by the dismal conditions in the industry caused by the Great Depression. Seven years later, however, the U.S. Supreme Court reversed course. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Supreme Court rejected the approach it took in *Appalachian Coal* and unequivocally reaffirmed the *per se* rule for horizontal price fixing.

⁵³ *See supra* note 39.

price competition, but not on technological innovation, to attract customers in both domestic and international markets. This puts significant pressures on companies to cut costs, by all means possible, even if such cost-cutting measures would violate product safety laws, consumer protection laws, labor laws or antitrust laws. The lack of technological innovation is a larger problem in China's economy that needs to be dealt with through broader reforms, such as reforms of intellectual property rights protection and even educational reforms. Finally, China's economic growth has been overly relying on investment and export, but not on domestic consumption. Much has been said, rightly or wrongly, about the effect of China's economic growth model on the global structural imbalance, but less attention has been paid to the implications of this economic growth model for China's competition policies. When Chinese consumers consume fewer products or services than producers are willing to supply, the competition among producers can only be expected to intensify. And at a time when China's law enforcement is less than ideal, this intensifying competition will in all likelihood go in the direction of hurting—rather than benefiting—consumers. Broader reforms, such as macroeconomic policy reforms and consumer credit reforms, will likely be helpful in this regard.

C. Mergers and Acquisitions in China by Foreign Companies

Foreign investors have played an important role in China's economic revival since the very beginning of China's economic reforms almost three decades ago. In recent years, however, the role of foreign investment has become more controversial in China, as foreign investors stepped up their efforts to acquire Chinese companies and accelerated their penetration into China's domestic markets. As we will discuss below, this broader debate on the role of foreign investment has important implications for China's antitrust policy.

Upon China's accession to the World Trade Organization in 2001, China agreed to drastically reduced tariff levels and made numerous market access commitments regarding a number of industries. In the years following China's WTO accession, foreign companies increasingly steered their investment in China towards acquiring local Chinese companies, in part by leveraging on China's WTO accession commitments. Increased mergers and acquisitions by foreign companies heightened China's concerns that its industries might be dominated or even controlled by foreign companies. The recent intervention by the government in an attempted acquisition by the U.S. private equity firm Carlyle Group of Xugong Construction

Machinery, China's leading manufacturer of heavy construction equipment, reflected these concerns. It was reported that Carlyle Group initially signed an agreement with Xugong to buy 85% of its shares in October 2005. However, the deal was fiercely opposed by government officials as well as rival companies. About one year later, Carlyle Group agreed to take a less than 50% stake in Xugong in exchange for the government approval of the acquisition.⁵⁴

The new limitations imposed on mergers and acquisitions by foreign companies are part of China's broader efforts to scale back foreign investment in China in certain sensitive sectors. Since China's accession to WTO, although China has more or less fulfilled its market access commitments, it has also revoked some of the preferential treatments previously accorded to foreign investors and, in some cases, has put in place some new restrictions on foreign investment.⁵⁵ Coincidentally or not, the flow of foreign investment into China has shown signs of levelling off in recent years.⁵⁶

In light of China's goal of limiting foreign investment in certain sectors, China may be tempted to use competition policy as a tool to achieve that goal. The promulgation of the 2006 M&A Rules is seen by many as the first step in that direction. When drafts of the new antitrust law were being discussed, many multinational corporations feared that they would become the

⁵⁴ See *Carlyle Agrees to Hold Minority of Xugong's Shares*, SOHU BUSINESS ONLINE, October 17, 2006, <http://business.sohu.com/20061017/n245845506.shtml> (last visited March 28, 2007).

⁵⁵ For example, on March 16, 2007, China's National People's Congress adopted the amended Corporate Income Tax Law that would abolish the preferential corporate tax treatment currently enjoyed by foreign-invested companies. In December 2005, China's Securities Regulatory Commission imposed a moratorium on new foreign investment in Chinese securities brokerages. In August, 2006, China's Banking Regulatory Commission announced a requirement that foreign banks incorporate their local operations in China if they want to engage in RMB-denominated business with Chinese individuals. While these restrictions technically do not violate China's WTO commitment, foreign investors have criticized them as steps in the wrong direction. See Statement of John R. Dearie, Testimony before the U.S.-China Economic Security Review Commission, August 22, 2006, http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_08_22_23wrts/06_08_22_23_dearie_john.php (last visited March 28, 2007).

⁵⁶ In 2006, China saw a 4% decrease in foreign investment compared with the year before. See Ariana Eunjung Cha, *China Gets Cold Feet for Foreign Investment: New Regulations Spawn Fears of Economic Nationalism*, THE WASHINGTON POST, February 2, 2007, Page D01.

law's first targets.⁵⁷ This fear was reinforced when a Chinese court in early 2007 decided to hear antitrust claims filed by a local Chinese company against a prominent multinational company.⁵⁸

The temptation to rely on competition policy to deal with surging foreign investment leads to another challenge facing China's antitrust policymakers: should the new antitrust law be focused primarily on foreign companies, or should it be applied equally to both foreign and domestic companies? The answer undoubtedly is the latter. While China may rightly be concerned about possible aggressive campaigns by behemoth multinational corporations to monopolize Chinese domestic markets, it would be a grave mistake for the new antitrust law to be intended for—or to be strictly enforced against—foreign companies only. The losses to consumer welfare caused by the anticompetitive acts of domestic companies are no less real than the losses to consumer welfare caused by the anticompetitive acts of foreign companies, and indeed, the degree of monopolization by foreign companies, often exaggerated in the Chinese media, is far less than the degree of monopolization in the industries controlled by SOEs. To focus the new antitrust law only on foreign companies, or to strictly enforce the new antitrust law only against foreign companies, would lead to missed opportunities to address a major source of distortion in China's economy. China's antitrust policymakers should be reminded, therefore, that for the new antitrust law to be of any economic significance, it has to be aimed at domestic companies as much as it is aimed at foreign companies.

D. Treatment of Administrative Monopolies

The most important feature of China's draft antitrust law is the devotion of an entire chapter to the issue of administrative monopolies. Chapter Five of the draft antitrust law sets forth the general principles dealing with governmental actions that have the intent or effect of creating monopolistic conditions. It specifically lists several categories of governmental actions

⁵⁷ See Rebecca Buchman, *China Hurries Antitrust Law*, WALL STREET JOURNAL, June 11, 2004, page A7.

⁵⁸ On January 17, 2007, The Shanghai No 1 Intermediate People's Court heard claims by a local Chinese company that Sony and its joint venture in China engaged in unfair competition by designing their digital cameras to shut down when batteries made by competitors are installed. The court did not rule at the end of the hearing and the case is still pending.

that are prohibited under the draft law: designation of deals, regional blockades, restrictions on bidding, restrictions on market entry, and restrictions on competition.

The inclusion of the prohibition of administrative monopolies in the draft antitrust law has a tortuous history. The prohibition appeared in the first several drafts released for comments beginning in 2002. It was reported, however, that in December 2005 the State Council deleted the entire chapter of the draft law dealing with administrative monopolies from an internal draft and only kept a declaratory statement prohibiting administrative monopolies in principle in the general rules section.⁵⁹ In June 2006, the State Council officially approved a draft that did not contain the chapter on administrative monopolies.⁶⁰ But several weeks later, when the State Council submitted the draft law to the NPC Standing Committee for review, the chapter on administrative monopolies was added back in.⁶¹ These unusual changes in the text of the draft law, more than anything else, reflect what perhaps is the biggest dilemma facing China's antitrust policymakers—i.e., whether China should include provisions prohibiting administrative monopolies in the new antitrust law.

The draft AML does not give a definition of “administrative monopolies.” But suggested by the name, administrative monopolies are monopolies created by administrative agencies. Specifically, in the Chinese context, such monopolies result from the following three kinds of governmental actions:

First, administrative monopolies result from governmental measures that are intended to restrict competition in a particular industry, or from governmental measures that compel certain anticompetitive conduct. For example, in 1999, China's Bureau of Civil Aviation issued an order prohibiting airlines from offering air ticket discounts, citing the adverse effect of price

⁵⁹ See Xiaodong Xie, *Anti-Administrative Monopolies Chapter Deleted in Entirety from Draft Antimonopoly Law*, PEOPLE'S DAILY ONLINE, January 11, 2006, <http://www.people.com.cn/GB/54816/54822/4016799.html> (last visited March 28, 2007).

⁶⁰ See *State Council Approves Draft Antimonopoly Law Without Chapter on Administrative Monopolies*, PEOPLE'S DAILY ONLINE, June 8, 2006, <http://finance.people.com.cn/GB/1037/4448654.html> (last visited March 28, 2007).

⁶¹ See Na Liu, *Draft Antimonopoly Law on Schedule for Review; Chapter on Administrative Monopolies Added Back In*, THE ECONOMIC OBSERVER, <http://info.finance.hc360.com/2006/06/25102650097.shtml> (last visited March 28, 2007).

competition on the healthy development of the airline industry.⁶² In the draft AML, such governmental measures are declared illegal under Articles 30 and 31.

Second, administrative monopolies also result from governmental measures that mandate the use of products or services by certain producers, which usually are “affiliate companies” of the government agencies. Those “affiliate companies” are in most cases SOEs or former SOEs currently or previously controlled by the government agencies in question. A good example of this practice is that some local civil affair agencies in charge of issuing marriage licenses require applicants to take pictures to be affixed to marriage licenses only at designated photo studios. Such steering of business towards affiliated companies using government power is declared illegal under Article 26 of the draft AML.

Third and most important, administrative monopolies also result from governmental actions that restrict market entry. This problem is more serious at the local level, where the local governments are notoriously known for creating various barriers to firms from other localities. This local protectionism is what is commonly known as “regional blockage” and is declared illegal under Articles 27, 28, and 29.

All of the three variants of administrative monopolies are made possible by the ability of governmental agencies, at both the central and local levels, with or without statutory authority, to require government approvals for a wide range of economic activities. According to a survey conducted by the State Council, as of 2003 there were a total of 4,159 government programs in which approvals of some sort from various governmental agencies were required, and more than 2,000 approval requirements were implemented without any legal basis.⁶³ To make things worse, in many cases businesses have to navigate through the maze of those approval requirements without clear guidance from the governmental agencies.

How serious is the problem of administrative monopolies in China? The following statistics provide a clue. It is reported that since 1993, the SAIC investigated 5,642 cases of monopolies pursuant to the Anti-Unfair Competition Law, 519 of which were administrative

⁶² However, the ban on discount air tickets was frequently ignored by the airlines, and the ban was finally lifted in early 2003.

⁶³ See Jianjun Wang, *Special Interests the Greatest Obstacle to Market Development*, LIAOWANG NEWS WEEKLY, http://news.sohu.com/20061213/n247014585_1.shtml (last visited March 28, 2007).

monopolies.⁶⁴ The same report stated that since its establishment in 2003, MOFCOM has reviewed 432,841 policies of local governments that allegedly contained elements of regional blockades, pursuant to the 2001 Rules on Prohibiting Regional Blockades in Market Economic Activities. Of those 432,841 policies, 301 were modified or annulled by MOFCOM.⁶⁵ On the face of the statistics, it may seem that administrative monopolies constitute only an insignificant part of the total cases being investigated or reviewed. However, the source of the statistics observed that this is a result of selection bias, as the government authorities were reluctant to investigate or confront administrative monopolies because of what they saw as the futility of such actions.⁶⁶

In deciding how to approach administrative monopolies in the new antitrust law, China's antitrust policymakers face a real dilemma. On one hand, as the ubiquity of administrative monopolies has made administrative monopolies *the* major source of monopolies in China's economy, China's antitrust policymakers feel obliged to address administrative monopolies in the new antitrust law. Many commentators believe that without provisions prohibiting administrative monopolies, the new antitrust law would necessarily be incomplete and would lose much of its relevance.⁶⁷ Furthermore, without a chapter on administrative monopolies, the public may believe that the government does not have the resolve to fight monopolies at all and may discount the credibility of the other provisions of the law.

On the other hand, prohibiting administrative monopolies in the new antitrust law will almost certainly yield few successes in the near future, given China's current economic and political realities. Using the new antitrust law to fight administrative monopolies faces two institutional problems that China's political system is not yet ready to handle:

⁶⁴ See *Anti-Administrative Monopolies Chapter Deleted in Entirety from the AML*, PEOPLE'S DAILY ONLINE, January 11, 2006, <http://www.people.com.cn/GB/54816/54822/4016799.html> (last visited March 28, 2007).

⁶⁵ See *Id.*

⁶⁶ See *Id.*

⁶⁷ See, e.g., Ya Jie, *Antimonopoly Law Must Address Administrative Monopolies*, China Industrial & Business Times, available at <http://biz.163.com/06/0419/10/2F2JT1NE00021RH4.html> (posted on April 19, 2006; last visited on March 12, 2007).

First, at the central government level, if the various governmental agencies of the central government are made subject to the new antitrust law, the proposed Antimonopoly Enforcement Agency will be required to bring antitrust enforcement actions against government agencies of the same or even higher rank. Unless China has a government system based on clearly defined rules of law—which China currently does not—such an institutional arrangement will inevitably create confusion within the political system and set off disruptive power struggles among different government agencies.

Second, at the local government level, prohibiting administrative monopolies in the new antitrust law will have serious implications for the relationship between the central and local governments. Enforcing the new antitrust law against local governments, whether by the proposed Antimonopoly Enforcement Agency or by the courts, will only exacerbate the so-called “central versus local governments” problem, i.e., the problem with enforcing the orders and policies of the central government at the local level. The “central versus local governments” problem has existed in China since the first days of the Middle Kingdom.⁶⁸ “The mountain is high and the Emperor is far away.” “Where there are policies from above, there are counter-policies from below.” These old Chinese sayings speak vividly to the troubled relationship between the central and local governments. If China uses the new antitrust law to address local protectionism and “regional blockade,” will it be able to overcome the “central versus local governments” problem that it has not been able to overcome in the last 3,000 years? The answer is obvious.

Moreover, if China does include administrative monopolies in the draft AML, it will face another kind of credibility problem, this time pointing in the opposite direction. If the government knows that it will not be able to enforce the prohibition of administrative monopolies and yet still includes it in the law, it may send a signal to the public that it does not

⁶⁸ The relationship between the central and local governments has been problematic since the Zhou Dynasty (1,122 B.C.—225 B.C.) and has remained so until today. One of the most dramatic episodes of the “central versus local governments” problem is the civil war waged by Emperor Kangxi of the Qing Dynasty in the 1670s against three feudal lords, who were granted their fiefdoms as rewards for their contributions to the establishment of the Qing Dynasty but who later grew defiant of the orders of the Emperor. The war, spanning eight years and spreading to almost half of China’s territory at the time, ended with a complete victory of the Emperor.

expect to strictly enforce every provision of the law. As a result, the public may discount the government's resolve in enforcing the new law as a whole.

However, supporters of the prohibition on administrative monopolies in the AML would quickly point out that some variants of the prohibition are already contained in China's current antitrust rules. Article 30 of the 1993 Anti-Unfair Competition Law prohibits restrictions on competition by using administrative power. The 2001 Rules on Prohibiting Regional Blockades in Market Economic Activities specifically bans regional blockades. Therefore, including the prohibition in the AML will not be something that is completely out of the ordinary and will be consistent with public expectations. Indeed, supporters of the prohibition may argue that, although enforcement of the prohibition under the current antitrust rules is not very effective, including the prohibition in the new antitrust law is the only way to preserve continuity in the treatment of administrative monopolies in the antitrust law.

No matter whether the prohibition of administrative monopolies is included in the AML or not, it is clear that China's antitrust policymakers will face difficult issues either way. These difficult issues may have been the primary reason behind the current gridlock on the draft AML. But whatever decision China's policymakers may make with respect to administrative monopolies, they need to be fully aware of the consequences and implications of their decision.

On one hand, if China's antitrust policymakers eventually decide to exclude administrative monopolies from the AML, it will be important for them to keep in mind that such a decision will not be an endorsement of administrative monopolies, and nor will it be a decision to do nothing about them. It will simply be an acknowledgment of the fact that the AML cannot cure all evils in one swoop, at least not at this time. A decision to not address administrative monopolies in the AML will not make the AML irrelevant, either. Although administrative monopolies undoubtedly are the major source of monopolistic behavior in China's economy today, anticompetitive acts by economic entities that do not have government power are nonetheless very significant, and more importantly, are growing. As the government further retreats from the economy, antitrust issues will be created increasingly not by the government, but by economic entities such as commercialized SOEs, private enterprises, and foreign companies. By focusing on antitrust problems arising from economic behavior at this time, China essentially would start on a path with the least resistance, as it did with its general economic reforms three decades ago. The hope is that the early success of reforms will create

benefits to a wide swath of society and rebalance the distribution of vested interests in society, so much so that reforms that were previously unconceivable may become realistic goals later. That is the essence of the Chinese-style incremental improvements that have worked so well in China's general economic reforms so far. When it comes to antitrust, the same incremental approach may be worth a try.

On the other hand, if China's antitrust policymakers eventually decide to address administrative monopolies in the AML, it will be important for them not to expect immediate success. Administrative monopolies are such a problem in China that any success in dealing with them is likely to come about only incrementally. It is also important for the Chinese policymakers to not see the AML as the sole vehicle or even the most important vehicle through which to address administrative monopolies.⁶⁹ The nature of administrative monopolies means that their elimination will necessarily require other reforms, such as constitutional and government structure reforms. Indeed, in most developed countries, such as in the United States, administrative monopolies are dealt with in the general antitrust law only to the extent that they are a result of the action of the state as market participant. In dealing with monopolistic conditions created by the state as sovereignty and market regulator, the United States generally leaves the job to the democratic legislative processes at both the federal and state levels, while using certain important legal mechanisms—such as the “Dormant Commerce Clause”⁷⁰ and the federalism doctrine⁷¹—to correct any failures of the democratic processes in this regard.

⁶⁹ It seems that China's antitrust policymakers are well aware of this point. Article 6 of the current draft AML points out that the furtherance of reforms of the government functions are needed to rein in the abuse of administrative power that harms competition. This seems to indicate a recognition among Chinese authorities that administrative monopolies are not something that will be cured by the AML alone.

⁷⁰ The U.S. constitution grants Congress the power to regulate interstate commerce in the so-called “Commerce Clause.” By negative implication, the U.S. Supreme Court holds that states do not have the power to regulate interstate commerce. This so-called “Dormant Commerce Clause” doctrine played a vital role in striking down state regulations that were aimed at or had the effect of blockading the commerce of other states. *See, e.g.,* *Gibbons v. Ogden*, 22 U.S. 1 (1824) (invalidating New York's grant of steamboat monopoly); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (holding that New York may not protect its local interests by limiting access to local markets by out-of-state milk sellers); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a New Jersey law which prohibited the importation of most solid or liquid waste which originated or was collected outside of the territorial limits of New Jersey); *Granholm v. Heald*, 544 U.S. 460 (2005) (ruling that New York and Michigan laws allowing in-state wineries

E. Antitrust Enforcement

1. Which Agency?

An important consideration in drafting any law in any country is how the law is going to be enforced. This is more so in China, where enforcement of a law in many cases is a larger issue than the law itself.

The responsibility for enforcing China's current antitrust rules is shared by at least three agencies: the SAIC as authorized by the 1993 Anti-Unfair Competition Law, the National Development and Reform Commission as authorized by the 2003 Provisional Rules on Prevention of Monopoly Pricing, and MOFCOM as authorized by the 2006 M&A Rules. In particular, SAIC and MOFCOM are the two main candidates to house the new Antimonopoly Enforcement Agency. An alternative to having SAIC or MOFCOM enforce the AML is to create a new agency.

Earlier drafts of the AML proposed the establishment of the Antimonopoly Enforcement Agency under the State Council. There was speculation that the Antimonopoly Enforcement Agency would be created within an existing ministry. Given the prominent roles SAIC and MOFCOM play in enforcing the current antitrust rules, these two agencies naturally become the

to ship wine to consumers directly but prohibiting out-of-state wineries from doing the same is unconstitutional).

⁷¹ Under the federalism doctrine, the U.S. federal government can only exercise power granted by the U.S. Constitution. The U.S. Supreme Court has used the federalism doctrine to invalidate federal laws that had the purpose or effect of limiting competition. Most notably, in 1935, in the “sick chicken” case, the U.S. Supreme Court struck down one of the most dramatic efforts by the Roosevelt Administration to stabilize the U.S. economy during the Great Depression—the National Industrial Recovery Act of 1933 (“NIRA”). *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Enacted to combat falling prices and intensifying competition during the Great Depression, the NIRA authorized the President, ordinarily upon application by trade associations, to promulgate “codes of fair competition” for the trade or industry. Several hundred codes were adopted in accordance with the NIRA. The codes usually contained provisions concerning minimum wages and prices, maximum hours, and unfair trade practices. In 1935, the Supreme Court struck down the entire act, holding that in enacting the act, Congress exceeded its commerce power and unconstitutionally delegated its legislative power. Interestingly, there seems to be a striking resemblance between the “codes of fair competition” authorized under the NIRA and the “industrial self-disciplines” authorized by the Chinese government today. See discussion of the “industrial self-disciplines” in section IV.B.

leading candidates to house the future Antimonopoly Enforcement Agency. SAIC is primarily charged with the micromanagement of the market activities, ranging from business and trademark registration to street market regulation. SAIC has branches in virtually every city in China. At the central level, SAIC has a Bureau of Fair Trade, under which there is an Antimonopoly Division. However, this division has only five staff members.⁷² In March 2004, SAIC released an investigative report that described multinational companies' alleged anticompetitive behavior in China.⁷³

The other candidate enforcement agency is MOFCOM, a powerful ministry created during the government restructuring in 2003 that combined the former Ministry of Foreign Trade and Economic Cooperation and many functions of the former SETC. In late 2004, MOFCOM established an Antimonopoly Investigation Office under the Department of Treaty and Law.⁷⁴ This office now has about the same level of staffing as its counterpart in SAIC. Both agencies were designated as the agencies to review foreign acquisitions of domestic companies in the 2006 M&A Rules.⁷⁵ However, the Antitrust Filing Guidelines accompanying the M&A Rules was issued by MOFCOM alone. Neither office seems to have enough manpower or resources at present to handle potentially vast amount of antitrust work under the AML. The amount of resources needed is likely to be large given the size of China's economy and the amount of anticompetitive activity currently present in the marketplace. Even if staffing levels can be increased quickly, the relevant knowledge, skills and experience take time to build.

An early 2004 draft proposed to establish the Antimonopoly Enforcement Agency under the MOFCOM, but later drafts have retreated from that position. The current draft only states that an Antimonopoly Enforcement Agency will be established, without specifying where it will

⁷² See SAIC, *Functions, Organization, and Staffing of the Bureau of Fair Trade*, http://www.saic.gov.cn/zhzjg/jig_3.html (last visited March 28, 2007).

⁷³ See SAIC, *Multinational Companies' Competition Restricting Behavior and Counter Measures*, SAIC Pub. No. 5, 2004.

⁷⁴ See *MOFCOM Establishes Antimonopoly Investigation Office*, CHINA NEWS NET, September 17, 2004, <http://www.china.org.cn/chinese/2004/Sep/661853.htm> (last visited March 28, 2007). Noticeably, this was a few months after the release of the SAIC report.

⁷⁵ See *supra* note 11.

be established.⁷⁶ No matter who will become the Antimonopoly Enforcement Agency, however, it will be wise to have one instead of two enforcement agencies, as a single enforcement agency avoids the potential inconsistency that may be created in a dual enforcement structure.

In addition to the Antimonopoly Enforcement Agency, the current draft AML proposes the establishment of an Antimonopoly Commission directly under the State Council. The Antimonopoly Commission is intended to be an advisory body staffed by high level officials from different government agencies. The day-to-day AML enforcement activities will be carried out by the Antimonopoly Enforcement Agency.

The establishment of the new Antimonopoly Enforcement Agency will necessarily result in diminished roles for the agencies currently responsible for antitrust enforcement and regulatory supervision. Perhaps to reduce the resistance from these agencies, the current draft makes the compromise that monopolistic activities subject to the AML that are also within the scope of other regulatory agencies' investigative power based on other laws and administrative regulations will be investigated by those other agencies, and these other agencies are required to report their enforcement results to the Antimonopoly Commission. The Antimonopoly Enforcement Agency investigates such matters only when they are not investigated by other agencies. However, this compromise would eliminate one of the major advantages of the AML over the current fragmented antitrust laws—i.e., a uniform enforcement agency that can be counted on enforcing the antitrust law in a consistent and predictable manner. Similar provisions of US law have not been successful in promoting competition in regulated industries. Because of regulatory capture, regulators often seek to protect regulated firms from outside entry and from competition among themselves. Giving these regulators exclusive jurisdiction to enforce antitrust law within their jurisdictions will likely result in competition taking a back seat to industry interests.

2. Which Enforcement Priorities?

Given the limited institutional capability and resources at least at the initial stage, China's future Antimonopoly Enforcement Agency will need to set priorities for its enforcement goals.

⁷⁶ See Article 5 of the current draft of the AML.

A good start is to focus first on horizontal restraints of trade, especially cases of price fixing and bid rigging, where large benefits can often be obtained for consumers by breaking up the cartels and introducing competition. Enforcement in this area has high payoffs because it is likely to deter behavior that harms consumers and unlikely to erroneously deter competitive behavior that benefits consumers.

In countries with new competition policies, there is often a tendency to focus on complex vertical relationships because of complaints about these matters filed by competitors, and consumer protection issues because of great popular appeal. Oftentimes, certain contracts or contractual terms, or pricing schemes in general, may strike people as unfair, even if they actually promote economic efficiency. Examples include vertical price restraints, unilateral refusals to deal, certain tying arrangements, “unfairly high price in selling or unfairly low price in purchasing,” predatory pricing, and price discrimination.⁷⁷ In societies that are skeptical of the legitimacy of markets, enforcement focusing on these issues often illustrates the popular or ideological basis for the skepticism. Antitrust action in these areas requires painstaking investigation and analysis, not merely to decide whether the behavior in question is harmful or beneficial to consumers, but to avoid creating unintended deterrent effects on future economic activity that is beneficial to consumers. In general, it is important to resist the temptation to give priority to investigations that consume a vast amount of resources but have minimal benefits.

Although the antitrust review of proposed mergers, acquisitions and joint ventures is a very useful device to avoid anticompetitive concentration without the messy complication of ex post disassembly of a consummated transaction, the amount of work involved can easily be overwhelming. Unfortunately, the current draft AML applies to all consolidations that meet the sales thresholds rather than just consolidations of competing firms. The effect could be to unnecessarily burden the Antimonopoly Enforcement Agency and increase the delays associated with obtaining agency clearance for mergers with little or no potential for anticompetitive effects, including many beneficial mergers. It is important for the Antimonopoly Enforcement Agency to give quick clearance to mergers that do not pose a competition issue and focus on

⁷⁷ See current draft AML, Articles 8 and 15.

those that have clear overlaps. This implies the need for a limit on the amount of time transactions are held up pending agency decisions on enforcement.

3. The Importance of Transparency and Consistency

For the AML to influence business behavior in the intended way, businesses need to form both correct and clear expectations about enforcement. An earlier draft of the AML states that “the enforcement authority *should* publish its decisions,” a requirement that makes sense only if the published opinions are intended (as they should be) to influence future behavior of business firms. Publication of decisions and the reasoning behind them, however, is a necessary but not sufficient condition for effective deterrence. It is also necessary to have a rule that serves the purpose, in a common law system, of “*stare decisis*.” That is, the enforcement authority must to some extent be bound by its prior decisions and reasoning. If prosecutors (or courts) can decide each case without regard to the ways in which similar facts have been analyzed and treated in the recent past, private firms have no basis to form expectations about the consequences of their actions. The effect of this is to increase the risks of doing business, thus discouraging investment by ruling out investment projects that do not have a sufficiently high expected return to compensate investors for taking on the risk of (erroneous) antitrust prosecution.

The requirement to publish enforcement decisions would be a good first step to implement the AML in a transparent and consistent way. However, the current draft has changed this language to “the enforcement authority *may* publish its decisions.” This subtle change seems to reflect a reluctance of the Chinese authorities to commit to full disclosure of its future antitrust decisions, which is not helpful for private firms attempting to form expectations about the Antimonopoly Enforcement Agency’s actions. This retreat from a firm commitment to transparency and consistency may reflect the consideration that China’s antitrust authorities may well take into account other non-competition factors, such as public interest and the health of the national economy, in deciding competition cases, as stated in the draft AML. But here as well, making the enforcement agency responsible for such broad considerations may be a mistake. The agency’s decisions will be subject to political review, and it is in that review process that such considerations may enter.

More generally, unless antitrust enforcers are to attempt to examine every transaction in the economy, deterrence is the principal vector by which antitrust (and most other) laws achieve

their effects on economic behavior. Deterrence of anticompetitive behavior, however, has a dark side: inadvertent deterrence of efficient behavior. The deterrent effect of a law or regulation is affected by the probability of detection and successful prosecution (itself a function of enforcement resources), the firm's understanding of the law, and the penalties expected to result from successful prosecution. Very effective deterrence of anticompetitive behavior will also deter pro-competitive behavior if the law is unclear to private decision-makers or if private decision-makers anticipate frequent errors by prosecutors and judges.⁷⁸ Thus, transparency and consistency in enforcement are important in helping businesses form the right expectations.

The proposed law clearly contemplates reliance on administrative rather than judicial machinery as its primary enforcement mechanism, and calls for the enforcement agency to issue detailed rules and regulations to implement the law. In the end, given China's legal environment, as discussed in section III.C, it is these rules and their enforcement that will matter most. It would be inappropriate to evaluate the proposed law as if it were, as it would be in the U.S., a set of instructions intended for the judiciary to interpret.

In the current draft AML, private parties are given the right to judicial review if they are not satisfied with the Antimonopoly Enforcement Agency's decisions. Private parties are also entitled to recover damages resulting from monopolistic behavior. In the context of China's current legal system, it remains unclear whether this right increases or decreases the predictability of the process and therefore the potential for promotion of economic efficiency and growth. It is not clear what level of the courts will handle such appeals and lawsuits or whether the courts' decisions will be final. In general, the courts' ability to adjudicate antitrust cases is doubtful at this time, as they do not seem to have the necessary expertise.

China's antitrust policymakers are aware of the inadequate capacity of the courts in adjudicating antitrust cases under the AML. In some earlier drafts, civil liabilities and recovery of damages through litigation were emphasized. One draft even suggested a detailed methodology of computing damages. Later drafts, however, minimized direct mentions of the courts' role. Apparently there is hesitance to rely on the judicial system to handle antitrust cases.

⁷⁸ See generally, Kenneth Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, U.S. Dept. of Justice, EAG Working Paper 4-11 (Washington, U.S. Dept. of Justice, 2004).

To the extent administrative agencies are more competent in carrying out the AML enforcement, it makes sense at least in the short term to rely more on administrative decisions and remedies.

V. CONCLUSION

China has come a long way since the drafting process of the AML began in 1994. Compared with China's current antitrust laws, the draft AML made significant progress in terms of comprehensiveness, clarity, and consistency with economic principles. Despite the progress, China's antitrust policymakers still face significant challenges in reforming the country's competition policies. Those challenges implicate many of the most fundamental issues arising from China's transformation from a centrally-planned economy to a market economy. The resolution of those issues, however, needs not precede the adoption of the new AML.

Meanwhile, while the AML will be an important tool to carry out China's competition policy reforms, it is not the only one. Other reforms, such as SOE reforms, market entry reforms, constitutional and government structure reforms, and legal reforms, to name a few, will be indispensable to China's goal of promoting competition in its economy. In light of the complexity of the issues in China's competition policy reforms, it will be important for China's antitrust policymakers to not expect the AML to cure all evils in one swoop. Rather, China will be better served to take an incremental approach and enact an AML that is tailored to China's current realities, while keeping the momentum to engage in other reforms necessary to fully implement China's competition policy goals.



NEW DEVELOPMENTS IN WATER POLLUTION LAW AND POLICY IN CHINA: EFFECTIVE ENOUGH TO COPE WITH WATER POLLUTION CONFLICT?

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Water pollution is one of the most serious environmental issues facing China. In 2005, an exceptionally serious water pollution accident in the Songhua River – caused by an unintended and sudden chemicals explosion – heralded an official recognition of a water pollution crisis in China. Although there have been new initiatives in national law and policy concerning water pollution that attempt to respond to issues of: social conflict caused by water pollution; government accountability; liability of polluting entities; and citizens' rights in cases of water pollution, the challenges for the rule of environmental law in effectively reducing water pollution accidents and resolving water pollution conflict still exist. There is an urgent need to strengthen compliance and enforcement. This paper discusses the issues of water pollution conflict and the possible resolutions offered through law and policy.

Introduction

Water pollution is one of the most serious environmental issues facing China. In 2005, an exceptionally serious water pollution accident in the Songhua River – caused by an unintended and sudden chemical explosion – heralded the commencement of attention to the water pollution crisis in China.

According to *The China Environment Bulletin, 2009*, issued by the Ministry of Environmental Protection ('MEP') in June 2010, over 42 per cent of the water bodies of rivers were severely polluted, with water quality ranked at polluted classes (IV, V and below V¹).² Of all the rivers in the country, China invests the most in the Huai River to control pollution, but in spite of such investment, the severity of its pollution remains unchanged. Many species of fish which lived in the river ten years ago now no longer exist. The lakes connected to the river have also become polluted. In Wuhan, the capital city of Hubei Province, the water quality of most urban lakes is in the 'polluted' class (Classes IV and V).³ Bad water quality is affected by cost effective industrial planning. A 2006 survey on environmental risk conducted by the State Environmental Protection Administration,⁴ showed that 81 per cent of the 7,555 large-scale heavy chemical industry projects were located in watersheds and highly populated areas, 45 per cent of these were classified as sources of high risk.⁵

¹ The national environmental quality standards for surface water (2002) are divided into five categories of water bodies, based on their intended water use and conservation goals: Class I for the water source and the water in the State Nature Reserve; Class II for drinking water sources in Class I Protected Areas, rare fish and aquatic habitat protection areas, fish and shrimp spawning grounds, etc; Class III for drinking water sources in Class II Protected Areas, fish and shrimp winter grounds, migration channels, such as aquaculture, fishing water and swimming areas; Class IV for general industrial water areas and entertainment areas where water does not directly touch human bodies; Class V primarily for agricultural use and landscape viewing.

² Ministry of Environmental Protection ('MEP'), 'The State of China's Environment: Freshwater' (2009) *The China Environment Bulletin* <http://jcs.mep.gov.cn/hjzl/zkgb/2009hjzkgb/201006/t20100603_190435.htm>.

³ The Environment Protection Department of Hubei Province, *An Urge for Water Treatment in Wuhan* (2008) <http://www.hhepb.gov.cn/hbdt/hjxw/200810/t2008101_5928.html>.

⁴ The State Environmental Protection Administration ('SEPA') became the MEP in 2008.

⁵ SEPA, *The Final Report of the Investigation of the Environmental Management Risk of Chemical Industry in China* (2006) <<http://old.jfdaily.com/gb/node2/node142/node200/userobject1ai1399439.html>>.



The problems arising from bad water quality and water pollution are obvious; they affect both drinking water and agriculture. About 320 million rural people (about one quarter of China's population) do not have access to potable water. The polluted water of rivers and lakes are used for agricultural irrigation and cause large-scale soil contamination, and poor crop quality and yield. In recent years, there have been increasing cases of people, including many teenagers, who have been affected by heavy metals and other toxic substances caused by the use of contaminated water.⁶

Since 2005, social conflict caused by water pollution has increased because of the frequency of large water pollution accidents. According to articles in *The China Environment Bulletin* in 2007, 2008 and 2009, there were 34, 74 and 80 large water pollution emergency cases reported and handled respectively in those years.⁷ Because culpable enterprises often fail to take responsibility for compensating victims of pollution incidents and restoring damaged environments, the social conflict caused by water pollution is becoming an increasingly significant issue for the whole society.

No doubt social conflict over water pollution is a consequence of the interaction between social, economic, technological and environmental factors. There are many possible reasons why water conflict exists and persists, but there are also many possible resolutions. This paper discusses the issues embedded in water pollution conflict in China and the resolutions being explored through law and policy.

Water pollution conflict and the ineffectiveness of water law

Given the frequency of water pollution accidents and the consequent disputes, it is reasonable to ask whether environmental law and the existing command-control system for dealing with water pollution control in China can work. Responding to this question requires some background information about China's law and regulatory regime for water quality control.

In China, the national law that deals with water pollution is the *Law for Prevention and Control for Water Pollution* ('LPCWP'). It was introduced in 1984, revised in 1996, with the latest revision in 2008.⁸ Other national laws, such as the *Environmental Impact Assessment Law 2002*,⁹ are also used to regulate water pollution issues.

Water pollution conflict in China is, to some extent, a reflection of the ineffectiveness of LPCWP 1984, and other laws and policies concerning water quality control. The causes of ineffectiveness are threefold: weak accountability of the people's government; disregard for social responsibility by polluters (mainly enterprises); and indifference to the environmental rights of citizens to water. Each of these issues will now be examined in more detail.

⁶ A number of 'cancer villages' (the suspected cause of cancer being environmental pollution) have been reported in the last five years. One report told the story of a retired geologist, Lin Jin-xing, who dedicated himself to finding the cause of cancer in the village of Longling in Shaanxi Province. He collected and analysed samples of soil, water, crops and other materials that might contain cancer-causing substances. He concluded that the toxic discharge from a fertilizer factory situated five kilometers from the village into the waters and air in the region was causing pollution of soil, water and most of the crops that the villages depend upon. The Lin case was taken up by Premier Wen Jiabao who requested local leaders to take corrective measures. However no substantive action was taken and most villagers have now abandoned the land. Other stories of 'cancer villages' are available on the CCTV Discovery website (for example stories about: Shangba Village in Wenyuan County of Guangdong Province, 2001; several cancer villages in Shenqiu County of Henan Province, 2004; and Quwan Village in Xiangfan City of Hubei Province, 2005).

⁷ The total number of large environmental emergency cases in 2007, 2008 and 2009 were 108, 135 and 171 respectively. See *China Environment Bulletin* 2007/2008/2009), Chinese text can be retrieved at <<http://wenku.baidu.com>>.

⁸ *Law of the People's Republic of China on Prevention and Control of Water Pollution (LPCWP) 2008*, Standing Committee of National People's Congress, Order No 87, 28 February 2008. <<http://edu.westlawchina.com/maf/china/app/document?&src=nr&docguid=i3cf76ad30000011ef3546d026343198c&lang=bi&crumb-action=append&crumb-label=文件>>.

⁹ *Environmental Impact Assessment Law 2002*, Standing Committee of National People's Congress, Order No 77, 28 October 2002 <<http://www.gov.cn/gongbao/content/2002/content61822.htm>>.



Weak accountability of governments

Governments are key actors in China's water quality governance. They are responsible for setting overall pollution targets and pollution discharge standards. They are also empowered to formulate water pollution control policies and to use public financial resources to prevent and treat pollution. In addition, governments and their environmental protection departments have the power to enforce environmental law. In recent years, the effectiveness of governments' performance in water pollution control has been questioned. *The China Environment Bulletin 2005* reported that the targets for the control of major pollutants stated in the Chinese Government's 10th Five-Year Plan period (2001-2005) for national environmental protection objectives, have not been achieved.¹⁰ One of the non-achieved targets concerning water pollution, the indicator of Chemical Oxygen Demand ('COD') discharges, did not decrease but showed an increase of two per cent.¹¹ This news item was the first time the Chinese central government raised the issue of the need for governmental accountability to fulfil environmental protection targets and tasks.¹² The item initiated much legal discussion on how environment law could be improved. As a result of this consideration, the 11th Five Year Plan (2006-2010) introduced compulsory targets to address governmental accountability.

The difficulty faced by local people's governments was how to balance economic growth, and social and environmental development with water pollution control. Under the current pattern of economic development, governments themselves are stakeholders in economic growth. They share a significant proportion of economic gain from the business activities of enterprises causing water pollution. This benefit-sharing mechanism between governments and polluters inhibits the desire of either party to comply with environmental law. When GDP growth becomes the overwhelming objective of regional development all around the country, many enterprises and their managers, and many officials and political leaders still believe that 'pollution first, treatment later' is the inevitable way for the country to prosper.

The pursuit of economic prosperity with a disregard for environmental protection has led to the setting of ineffective economic incentives to comply with environmental law. For example, the fee set for polluted discharge and the penalty for violations of environmental law are significantly less than the costs to remedy citizens' actual losses and to recover water function. To save on the cost of transportation and disposal of industrial waste, governments continue the – now out-dated – practice of allowing construction of heavy industrial factories along the banks of large rivers and lakes in populated areas and near the origin of water sources. Over 60 per cent of large and medium-sized chemical factories are located along the banks of the Yellow and Yangtze Rivers; in addition there are numerous small papermaking factories and tannery plants. Critics describe such industrial setting as 'chemicals surround cities'.¹³ Remedying the situation calls for the need to improve governmental accountability in environmental and social safety prior to economic development.

Although factories account for a significant amount of pollution, lack of sewerage infrastructure is also a significant factor. Over 58 per cent of Chinese cities have no sewage treatment infrastructure. Sewage treatment construction in the countryside, particularly in small towns which are becoming increasingly populated, has not yet begun. In cities that have sewage treatment facilities, many are not well maintained to save costs.¹⁴

¹⁰ SEPA, *The China Environment Bulletin* (2005) <<http://www.zhb.gov.cn/plan/zkgb/05hjgb>>.

¹¹ Environmental Planning Academy of China, *Analysis of Implementation of the Eleventh Five-Year National Environmental Protection Planning Targets* (2006) <<http://www.chinanews.com.cn/news/2006/2006-04-12/8/715966.shtml>>.

¹² The 11th Five Year Plan consequently introduced 'obligatory targets'.

¹³ X Wu, 'Who secures the Safety from Chemical Industry', *China News Net* (online), 18 August 2010 <<http://news.xinmin.cn/rollnews/2010/08/18/6367325.html>>.

¹⁴ Chou Baoxing, the Vice Minister of Ministry of Housing and Urban-Rural Development, announced, at the 5th International Congress on Water Service Development in China for Cities and Towns, 10th November, that in the next five years 2011-15, China will invest 150 billion yuan in developing sewage service facilities, in particular in small cities and towns. B Chou, 'The Speech to the 5th International Congress on Water Service Development in China for Cities and



The liability of polluters

Water polluter liability in Chinese law is fairly strict. The *LPCWP* has many principles and instruments that theoretically regulate polluters' activities. Measures such as: the need to conduct environmental impact assessments ('EIA'); pollutant discharge control (for example polluters reporting and registering to the authority on the quality and exact location of pollutant discharge, the standard of pollutant discharge and treatment); polluter pays (including the fee and the penalty for pollutant discharge), time-limited treatment orders, removal of old production processes and facilities. However these command-control measures have not effectively deterred entities from polluting water.¹⁵

A fundamental cause for failure of the *LPCWP* measures is the varying interpretations of the polluter-pays liability. As already mentioned, fees and penalties for polluting beyond allowable discharge levels are very low, providing little incentive to comply. In addition, small and medium-sized enterprises sometimes take illicit means to avoid payment of pollution discharge fees by laying covered conduits to discharge pollutants directly into water bodies, thereby avoiding detection of discharge by the environmental protection authority.

The water quality right of citizens

The right to clean water is fundamental to a citizens' right to health and should be upheld by Chinese law. But, as will be discussed below, Chinese civil law has traditionally advocated fault liability in pollution torts that are contradictory to environmental legislation. Consequently, courts have not upheld strict liability and have maintained a regime of victims' burden of proof. The way that pollution torts law works and the other general obstacles to citizens' access to justice have further exacerbated disputes and conflicts caused by water pollution.

Review of newly developed legislation and policy concerning water pollution conflicts

Since 2005, much legislative and policy efforts have been carried out to address water pollution issues in China. The most influential efforts have been: the 2008 revision to *LPCWP*; the new *Torts Liability Law 2009*;¹⁶ and other corresponding water pollution policies being piloted at a national or local scale.

LPCWP 2008

The *LPCWP* was formulated in 1984, and amended in 1996 with an aim to consolidate the supervisory power of the responsible authority to combat water pollution. However *LPCWP 1996* was criticised as still too weak. In 2008, a second revision of the *LPCWP* was completed by the 32nd Session of the Standing Committee of the Tenth National People's Congress. The revision extended the legislation's scope of water pollution activities. *LPCWP 2008* includes 30 more articles that cover the issues of: protecting drinking water (10 arts in Chapter 5);¹⁷ enhancing

Towns', *Hong Kong Commercial Daily*, 10 November 2010. This paper will use Chinese yuan as the currency measurement. The ratio of American dollar to Chinese yuan is approximately 6:5.

¹⁵ See *Explanation Document on the Revision Draft of the Law for Prevention and Control for Water Pollution 1996* provided by the Minister of the Ministry of Environmental Protection and presented to the Standing Committee of National People's Congress for reading and approval in 2007. Paragraph 8 of the Explanation Document is relevant. For the Chinese text of the Explanation Document, see <http://www.npc.gov.cn/npc/zt/2008-05/20/content_1494738.htm>.

¹⁶ *Torts Liability Law 2009*, National People's congress, Order No 21, 26 December 2009 <http://www.gov.cn/flfg/2009-12/26/content_1498435.htm>.

¹⁷ The articles with new elements to enhance governmental accountabilities exist in arts 5, 7, 18, 20, 74 and 75, and arts 9, 69, 72, 74, 75, 76, 80, 82 and 83 are for enterprises' liabilities.



governments' accountabilities and enterprises' liability;¹⁸ and improving mechanisms for citizens' participation in water pollution control and access to justice.

Protecting drinking water sources

Almost all water pollution disputes and accidents concern drinking water and the health of people. The Shaoguan Smelting Plant's illegal discharge of cadmium in 2005 and the Sichuan Chemical Co's waste leaks into the Tuojiang River in 2006 – together listed as the worst accidents and pollution in 2005-2008, brought about large-scale drinking water crises. The affected waters remain polluted, causing problems for both the local people and government. From the legal perspective, these situations occurred because *LPCWP 1996* did not provide enough emphasis on the value of protecting drinking water; it only provided very general prohibitive rules for the establishment of drinking water source protection zones ('DWSPZ'). Article 1 of *LPCWP 2008* established the importance of protecting drinking water sources and art 3 established the legal principle for overall water pollution control.

Moreover, *LPCWP 2008* has a chapter and specific measures for protecting drinking water sources and special water bodies. The system of DWSPZ that *LPCWP 1996* generally introduced is re-affirmed and improved in *LPCWP 2008*, and, in addition, *LPCWP 2008* adds a grading system for DWSPZ. There are two formal grades of DWSPZ (with different restrictive measures) plus a less formal quasi-protection zone for certain areas outside the DWSPZ when necessary:

- Within the first-grade DWSPZ, all new construction, reconstruction or expansion of construction projects that threaten water supply facilities and protection of water sources within drinking water source protection zones is prohibited; the conduct of cage aquaculture, touring, swimming, angling or other activities that may pollute drinking water bodies is prohibited (art 58).
- Within the second-grade DWSPZ, new construction, reconstruction or expansion of construction projects that discharge pollutants is prohibited; the conduct of cage aquaculture, touring or other activities are allowed but are pursuant to provisions to prevent the pollution of drinking water bodies (art 59).
- Within drinking water source quasi-protection zones, new construction or expansion of construction projects that seriously pollute water bodies is prohibited, and the reconstruction of projects must not result in an increase of discharge volume. In the case where the contamination of a drinking water source occurs that threatens the safety of a water supply, the environmental protection department must order the enterprises or institutions concerned to take measures to stop or reduce the discharge of pollutants (art 60).
- The State Council and the people's governments of provinces, autonomous regions and municipalities directly under the Central Government may stipulate and adopt measures to forbid or limit the use of phosphonium-bearing abstersgents, chemical fertilisers and pesticides, and limit cropping and breeding within drinking water source protection zones according to the need for protection of the marine environment (art 61).
- Along with the prohibitions and restrictions set for DWSPZ, *LPCWP 2008* stipulates liabilities for violation of the above-mentioned rules. In general, the setting-up of sewage outlets within DWSPZ is prohibited (art 57). If an entity sets up sewage outlets in the protected zones, it may be ordered to dismantle or close down the outlet within a prescribed time limit and be fined between 100 000 and 1 000 000 yuan (art 75).

The chapter dealing with zones also defines the responsibilities of the authority and its powers to set up or adjust DWSPZ; only the people's governments of provinces, autonomous regions or municipalities responsible to the Central Government have power to approve the plan and report with regard to the division of DWSPZ.

¹⁸ The new articles for citizen rights regarding water pollution control exist mainly in arts 10, 19, 25, 87 and 88.



Approval authorities and the State Council have power to intervene to adjust the scope of zones based on the actual need for the protection of drinking water resources. These centralised measures have been introduced to attempt to overcome lower level governments adjusting zone boundaries. The relevant local people's governments must set up clear geographical landmarks and conspicuous warning signs on the boundaries of DWSPZ (art 56)

An issue that remained unclear in *LPCWP 2008* was whether existing facilities located within DWSPZ would have to abide by the new regulations. Obviously, it is not enough if the new provisions on DWSPZ are only imposed on newly established entities.

Intensifying accountabilities of governments

LPCWP 1996 required local governments at all local levels to take responsibility for both the formulation and execution of water pollutant discharge standards, and prevention and control plans for water pollution. With regard to water disputes resulting from trans-boundary water pollution, it was the responsibility of local governments to arrive at a resolution that involved all stakeholders. However the provisions of *LPCWP 1996* were not effectively implemented. The approach of 'pollution to achieve development' – or 'pollution first treatment later' – tended to be the dominant philosophy in most regions. In order to force local governments to carry out development in an ecologically sustainable manner, *LPCWP 2008* created a series of legal instruments to address governmental accountabilities:

1. 'Governmental responsibility system' and 'Assessment and appraisal system'

An assessment and appraisal system makes the achievement of certain targets for protecting water bodies compulsory. Meeting targets will be taken into consideration in appraising whether local people's governments and their responsible persons perform appropriately and effectively in their governing period (art 5). Strictly speaking, the 'responsibility system' and the 'assessment and appraisal system' is not a legal approach but is capable of introducing political sanctions. *LPCWP 2008* is the first legislation to introduce political sanctions. There is some debate about whether the measure will work. Some commentators believe the measure will increase the will of local governments to take responsibility for water quality protection within their jurisdiction.¹⁹ Other commentators argue that political sanctions should not have primacy over legal force.²⁰

2. Total discharge control of major pollutants

Pollutant discharge control is one of the basic legal instruments to protect water quality. The conventional method in China was to use national or local standards that limited the concentration proportion of prescribed polluting substances for discharge into water bodies. The problem was that the concentration set often exceeded the natural load capacity of the waterway because total discharge from all polluters was not considered. *LPCWP 2008* introduced tighter controls by requiring that total discharge in very polluted water bodies needed to meet the national standard (art 16).

Because degradation of water bodies continued to occur even with the measures introduced in *LPCWP 1996*, *LPCWP 2008* extended the application of the total discharge limit of major pollutants to all water bodies. Article 18 empowers the people's governments of provinces, autonomous regions and municipalities which are directly under the Central Government to examine what receiving waters can accept then allocate allowable rates (sub control targets) to the people's governments of cities and counties. The people's governments of cities and counties are then required to ensure that discharges meet the standards set.

¹⁹ T Bie, 'Analysis on the progress of the new law for the prevention and control of water pollution' (2008) 3 *The Journal of Environmental Protection* 40.

²⁰ Professor Wang Jin at Peking University made such comments on the removal of local leaders and other means to resolving legal issues in the Zijin pollution accident.

LPCWP 2008 (art 18) requires that even the pre-2008 developments that have received approval to discharge at levels above those set after 2008 must comply: the environment protection department of the relevant people's government is required to suspend review of the EIA documents of enterprises that will increase discharge beyond allowable limits. In fact, the practice of suspending the review of EIA in the region where major pollutants exceeded the limit of total discharge began as a temporary measure in 2007 when Tangshan City in Hubei Province, Luliang City in Shanxi Province, Liupanshui City in Guizhou Province and Laiwu City in Shandong were ordered to suspend development and construction. *LPCWP 2008* has brought this temporary practice into the permanent regulatory regime.

This *LPCWP 2008* measure of controlling total discharge promises to be an important tool in alleviating the conflict between water protection, and economic development and construction.

3. Pollution discharge permits system

LPCWP 1996 required polluting entities to report: type of pollutants, discharge quantity and treatment facilities to relevant environmental protection departments. It also required enterprises to have treatment facilities. However *LPCWP 1996* had a significant loophole. It created two levels of fees: one for discharge within the legal standards; and one for discharge above the legal standard. The existence of the second fee implied that discharge above the legal discharge level was also legal and encouraged enterprises to disregard requirements for treatment facilities.

LPCWP 2008 abolished the second discharge fee and established that violations of legal discharge standards are subject to a penalty. In addition, *LPCWP 2008* adopted a permit system for pollution discharge: all entities wishing to discharge into waterways are required to obtain a permit from the relevant environment protection department. The permit prescribes conditions for discharge as stipulated in *LPCWP 2008*. The pollutant discharge permit system enables more accurate accounting for discharges by authorities, it also utilises a market mechanism by enabling the trading of permits.²¹

Supervision and enforcement power for the prevention of water pollution

Water pollution accidents are typical examples of the ineffectiveness of past water pollution routine supervision and enforcement controls. *LPCWP 2008* enhances supervisory powers in a number of ways:

1. Decentralised and increased power to order waste treatment within a prescribed time limit

Under *LPCWP 1996*, the environmental protection department had the power to propose that a violating entity be ordered to cease its activity but it was individual people's governments who were charged with the execution of the order. *LPCWP 2008* endows the environmental protection authority with direct power to order entities for water treatment to stop any illegal discharge by a prescribed time. This is an important decentralisation of executive power from the people's government to the environmental protection authority. Article 74 contains two relevant paragraphs: the first paragraph concerning this power shift reads:

[If] any entity, in violation of the provisions of this Law, discharges water pollutants exceeding the national or local standards for discharging water pollutants or exceeding control

²¹ A pilot program, 'compensated use and trading of discharge permit' ('CUTEPP'), was launched in 2008 in Tai Lake Basin of Jiangsu Province. Under this program, a cap is placed on the total COD allowed for discharge. Firms must purchase a permit. The permit allowance is based on their past EIA statistics, past COD discharge amount, and other data showing the firm's pollution status, and by the water environmental capacity and the total control quantity of the region in which the program operates. If a firm cannot get a permit or the quota it is allocated is not enough, it cannot start new projects or must purchase a permit from another enterprise. CUTEPP aims to explore the possibility of water pollution control through a market-based mechanism at a water basin scale in China.



target of the total discharge of major water pollutants, the environmental protection department of the people's government at or above the county level have power to order it to treat the water within a prescribed time limit and impose a fine on such entity amounting to a minimum of two times but less than five times the amount of the pollutant discharge fee payable.

The second paragraph of art 74 further authorises the environmental protection authority to properly supervise and enforce needed action, such as curbing production or discharge, or by ordering the suspension of production activities pending rectification of the problem within a prescribed time limit (generally within one year) or a further order to close down operations will follow.

2. Increased number of enforcement mechanisms and penalties

LPCWP 1996 has been criticized for having weak enforcement mechanisms.²² *LPCWP 2008* addresses some of the criticisms. Article 75 empowers the relevant environmental protection department to order violators, such as those who set up illicit sewage outlets or install covered conduits, to dismantle such facilities within a prescribed time limit and pay a fine ranging from RMB 20 000 yuan to 100 000 yuan.

The provision of this type of empowerment to an authority is rare in the Chinese environmental law regime.

In the case of the illicit installation of covered conduits or other serious acts, the responsible environmental protection department shall propose to the people's government at or above the county level that an order be given to the entity to suspend its production activities pending rectification of the illicit installation.

Where water contamination occurs – such as through the discharge of oil, acidic, viscous or alkaline solutions into a water body – or there is discharge of deadly toxic liquid waste into a water body, the environmental protection department has the power to appoint an entity or institution to take charge of cleaning up the contamination. Article 76 directs that the entity responsible for the polluting activity must pay the clean-up costs. Article 83 also provides the power to order a clean-up of water pollution incidents.

Penalties, especially fines, are the main instrument of enforcement in *LPCWP*. Previously, the imposition of fines was limited to the polluting entity or institutions. *LPCWP 2008*, however, extends the imposition of fines to individuals. Article 83 directs that where an entity or institution is in violation of the law which resulted in a water pollution accident, those with direct responsibility shall be fined an amount up to a maximum of 50 per cent of income gained from the entity in the immediately preceding year.

Moreover, *LPCWP 2008* increases the applicable scope of the administrative penalty. Compared with *LPCWP 1998*, *LPCWP 2008* adds six 'wrongful behaviours' (arts 74 and 75). They are failure to:

1. Install automatic monitoring equipment for water pollutants discharge,
2. Supervise monitoring equipment as required by law to ensure the equipment's effective operation,
3. Self monitor industrial waste water discharge;
4. Retain original monitoring records (art 72(2)(3)); and
5. Maintain discharges of water pollutants below the provisional standards or control targets of the total discharge of major water pollutants (art 74).

²² C F Wang and J Feng, 'New Development of Legislation on Preventing and Controlling Water Pollution in China' (2009) 8 *Journal of Beijing Forestry University*.

As well, art 75 counts as a 'wrongful behaviour' the installation of covered conduits for waste water discharge.

Increasing polluters' costs for violation of the law

If the cost of compliance is greater than that the cost (either monetary or personal) of violation of the law, a 'rational' manager may choose to violate the law. As already noted, this was the case in China with regard to water law. An objective of *LPCWP 2008* is to overcome this 'irrational' situation. The law introduces a number of improvements to redress the imbalance in the cost of violation.

The first improvement is an increase in the administrative fine. A 100 million yuan ceiling to the administrative fine that applied to a water pollution accident²³ assessed as 'gravely serious' or 'exceptionally serious' has been replaced in *LPCWP 2008* with a fine that may be up to 30 per cent of the direct loss caused by the water pollution accident. 'Comparatively serious' pollution incidents may attract a fine amounting to 20 per cent of direct losses caused by the incident (art 83).

The second improvement to *LPCWP 1996* that the 2008 amendments made was to enable the imposition of an administrative fine of between half million to one million yuan to an expanded range of violating conducts. The entire period in which the entities carried out the violating activity must be considered when determining the amount of the administrative fine. For example, *LPCWP 2008* imposes a fine amounting to a range of three to five times the discharge fee that ought to have been collected for the whole period in which the illicit discharge occurred (art 74); and a fine of one to three times the discharge fee for unlawful conduct has to be applied if an entity stops using a water pollutant treatment facility, or dismantles or lays idle such facilities (art 73). Therefore, the longer the entity pollutes water in violation of permitted amounts, the greater the fine.

A further improvement to the law made by *LPCWP 2008* is that, apart from the use of a higher administrative fine, authorities can use other administrative penalties such as ordering a cessation of the illicit conduct, suspension of business operations and even closing down the offending entity.

More rules for citizens to access the justice

Increased water pollution incidents and accidents are the cause of many environmental disputes and lawsuits concerning citizens' health or property damages. In general, Chinese environmental law adopts the doctrine of strict liability in pollution torts. However, for a long time, the absence of specific rules, such as rules pertaining to causality, the burden of proof and the measuring of pollution-affected damages, hindered the people's courts in using this doctrine.²⁴

LPCWP 2008 has made legislative progress in this area. Article 87 stipulates that, in a lawsuit for compensation for damages caused by water pollution, polluters bear the burden of proof in those instances where the causality between their conduct and the damages is in dispute (art 85).²⁵

²³ PetroChina, the nation's largest oil producer, was fined 1 million yuan, out of a net income of 133 billion yuan in 2005, for the accident that affected the drinking water of three million people. That contrasts with the US\$20 billion that President Barack Obama has demanded from BP for the worst oil spill in United States history.

²⁴ There were some important rulings but, in general, the system was ineffective. Two important judicial interpretations are especially relevant. The first is *The Opinions of the Supreme People's Court on Several Issues of the Application of Civil Procedure Law*, which came into effect on 14 July 1992. It adopted a reversion of the burden of proof to the inflictor in order to implement strict liability in environmental pollution torts litigation. The second is *The Several Provisions of the Supreme People's Court Concerning the Proof of Civil Lawsuit*, which took effect on 1 April 2002 to address not only the reversed burden of proof but also to explicitly address the deductive causality doctrine, described as 'no existence of causality of conduct and damage' in environmental pollution torts cases.

²⁵ These instances are defined in art 85 of *LPCWP 2008* as follows: 'In the instance of force majeure, or that victims on purpose conduct water pollution, the polluter is free from liability for damages to victims; and in the instance that third parties cause water pollution, the polluter first bears liability but can then revert to the third party for the lia-



Under art 88(1) and (2) of *LPCWP 2008*, representative lawsuits are recognised. The environmental protection departments and relevant social groups may join in a collective suit for civil damage (the law also urges the government to encourage legal service professionals and lawyers to provide legal assistance to aggrieved parties (art 88(3)). Although a step forward, these measures have not fulfilled public expectations. Critics argue that the law should be more innovative, giving certain social groups or public authorities a legal standing in public litigation for the sake of the water environment that is not dependent on human loss that resulted from pollution acts.

Torts liability Law

On 26 December 2009, the *Peoples Republic of China Tort Liability Law* ('TLL')²⁶ was released by the Standing Committee of the National People's Congress after eight years of discussion and debate. This Law formally entered into force on 1 July 2010. It serves as a separate ordinance of equal importance with another civil rights law, the *Peoples Republic of China Property Law*, which passed in 2007. These laws constitute China's civil code.

TLL 2009 presents a significant change to the civil law's position with respect to liability for environmental pollution by formally adopting strict liability. As commonly known worldwide, the remedy doctrine concerning pollution torts, including water pollution torts, is strict liability, whereby the violation of law or the subjective fault of the polluter is ignored as a fact of causality. However, the adoption of strict liability in Chinese environmental legislation has varied from the inception of the *Environmental Protection Law (EPL, Interim) 1979*²⁷ in which fault liability was effective, up to the present time. *LPCWP 1984* was the first environmental law to address the doctrine of relative strict liability regardless of narrower water pollution torts. This soon contradicted the basic civil law, the *General Rules of Civil Law* ('GRCL') 1986,²⁸ which recognized fault liability for all torts.²⁹ *GRCL 1986* stated that any person who polluted the environment and caused damage to others in violation of state provisions for environmental protection and the prevention of pollution, had to bear civil liability in accordance with the law. This meant that a person could be liable for environment pollution only when he/she violates the relevant law. Since then, although *LPCWP 1996* and *2008* – and even interpretations of the Supreme People's Court ('SPC'), have addressed the application of a strict liability doctrine, the contradiction between civil law and environmental law has provided the courts with the legislative loopholes for not to applying the strict liability doctrine because of the concern that its application would favour victims but hinder economic growth.

TLL 2009 redresses the situation by stating that polluters are assumed to take liability for the loss and injury caused by their pollution activities, irrespective of whether they act against the relevant environmental law or not. Along with the recognition of strict liability doctrine, *TLL 2009* clarifies the burden of proof is on polluters. It is a polluter's sole responsibility to defend himself by showing that he is not legally liable, and that there is no causative connection between his conduct and the harm caused to the victim. Joint liability is clarified in *TLL 2009*; if the environmental pollution is due to a third party's fault, the victim may seek relief and compensation either from the polluter or the third party. The polluter can pursue the responsible third party for compensation once it has compensated the victims for the damages incurred.

bility; and in the instance that the victim causes water pollution due to significant negligence, the polluter can mitigate the liability for damages'.

²⁶ *Torts Liability Law 2009*, National People's Congress, Order No 21, 26 December 2009 <http://www.gov.cn/flfg/2009-12/26/content_1498435.htm>.

²⁷ *Environmental Protection law (Interim) of People's Republic of China 1979*, The Standing Committee of National People's Congress, Order No 2, 13 September 1979 <<http://www.hflib.gov.cn/law/lawfalvfagui2/jjf/flfg/NL%20ZRZY%20HJBH/1152.htm>>.

²⁸ *General Rules of Civil Law of the People's Republic of China*, National People's Congress, Order No 37, 12 April 1986 <http://www.ahga.gov.cn/government/fagui/mf1/low_view1.htm>.

²⁹ Article 124 of the *GRCL 1986* states, 'Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law'.



Because *TLL 2009* has not been in effect for long, its effectiveness is not yet known, but the public has great expectations for more judicial favour to victims.³⁰

Policy initiative to address pollution liability

As mentioned in the introduction of this paper, many people assume that China is entering a period with an increasing frequency of environmental pollution incidents. To respond to this situation and strengthen the implementation of newly developed legislation against water pollution, two policies are notable: the pilot program of environmental pollution liability insurance; and the administrative compensation requirements in regions for exceeding pollution targets.

Environmental pollution liability insurance

In most water pollution accidents, damage to human health and property are difficult to compensate. The entities responsible for the pollution accidents usually only pay part of the remedy to victims, and governments and society bear most of the losses caused by the pollution. In order to ensure that victims receive proper and timely compensation in the event of unintended and sudden pollution accidents, Chinese governments are introducing market instruments to divert the risk of the management of water pollution incidents to other concerned parties. In February 2008, SEPA and the country's insurance regulatory commission jointly launched the environmental pollution liability insurance scheme by issuing the policy, *Guiding Opinions*. This policy effectively set a roadmap for establishing an environmental pollution liability insurance system in China.³¹

The development of the environmental pollution liability insurance system is being implemented in two steps: first, to carry out pilot projects in major industries and areas, and develop a list of enterprises and facilities (in major sectors) that buy insurance on the basis of the rate of environmental risks as well as the pollution damage compensation standards — this pilot project began in 2009;³² second, by 2015, to promote the system all over the country, and basically improve the various mechanisms for risk assessment, loss assessment, identification of liability, handling of the accidents and compensation.

The obstacles to promoting pollution liability insurance have become apparent during the pilot stage. Very few entities voluntarily engaged in the scheme because of: a lack of awareness of risk management; insurance premiums were high compared with other insurances; and enforcement of polluting behaviour in violation of the law was not stringent. Clearly, regulatory authorities need to develop good governance for the insurance industry to be able to operate. The pilot project also showed that technical issues, such as type of environmental liability insurance products, the scope of the liability and the rate of insurance premiums according to different kinds of products, needs to be resolved. More importantly, in the early stage of developing pollution liability insurance, some adverse impacts of the system need to be considered and avoided, for example the entities may take advantage of having insurance to discharge pollutants.³³

³⁰ Q Du, 'The People's Republic of China' in L Kotze, and A Paterson (eds), *The role of the Judiciary in Environmental governance: Comparative Perspectives* (Wolters Kluwer, 2009) 114.

³¹ The first case of environmental pollution insurance occurred in Hunan Province in September 2008. Zhuzhou Farm Chemical Company caused pollution to farmers. The Ping An Insurance Company that the polluter contracted compensated victim farmers. See the news report at <<http://hunan.voc.com.cn/article/200812/200812040926067210.html>>.

³² In 2009, these two departments jointly conducted pilot projects on environmental pollution liability insurance in enterprises: that produce, operate, store, transport and use hazardous chemicals; petrochemical enterprises and hazardous waste disposal enterprises that might likely have pollutant accidents; and, especially, enterprises and sectors that have suffered from major pollution accidents in recent years. See MEP, 'Local Practice on Environment Pollution Liability Insurance' (2010) 8 *The Journal of Environmental Protection* 25.

³³ L Pi, 'Green Insurance: Status, Issues and Suggestions' (2010) 16 *China Insurance* 3.



Administrative compensation mechanism for target-exceeded pollutants discharge

As already noted, the stipulation in *LPCWP 2008* of the total discharge control of major pollutants is an important technical instrument to accommodate other legally binding liability and obligations. For example, if total discharge controls of major pollutants fail in a region, the leader of the local government and the environmental protection department can be accused of being incompetent and removed from office. Or, alternatively, instead of political sanctions, administrative obligations may be imposed, such as the administrative compensation system imposed in Jiangsu Province, for water quality control of the Tai Lake basin.

In the Tai Lake case, there was a massive outbreak of blue-green algae in spite of efforts over many years to cut pollution discharges into the lake. One such outbreak in 2007 disrupted water supplies to the one million residents of Wuxi City. Since in 2007, Jiangsu Province has implemented an environmental compensation scheme based on the total allowable discharge level of major pollutants within the river basin.³⁴ The scheme stipulates that cities in the upper reaches of the basin must monetarily compensate those in the lower reaches if their pollutant discharges exceed the standards. In the first round of compensation at the end of 2008, the provincial capital city, Nanjing, paid 18 000 yuan (\$2 600) to the city of Changzhou, which in turn paid the same amount to Wuxi City on the lower reaches of the Tai Lake.³⁵ Since March 2009, Jiangsu Province government has extended this environment compensation scheme to another five cities in the Tai Lake basin³⁶. Collected payments are used for treatment of the water environment in the Tai Lake basin.

Future challenges in effective compliance and enforcement of water law

There are great hopes that the revised *LPCWP 2008* and relevant policies will lead to better management of the conflicts that arise from the tension between more economic development, and greater protection of the environment and human health.³⁷ But, as is well understood, the resolution of water pollution conflict does not only depend on 'good' law or even on 'strict' law, but also on effective compliance and enforcement of the law.

As a part of its implementation plan for *LPCWP 2008*, MEP investigated the operation of almost a million Chinese companies in 2008, ordering more than 2 000 of the investigated companies to suspend or curb production.³⁸ Between March and May 2010, MEP started a nationwide investigation of drinking water and mine tailing ponds, monitoring paper mills and water treatment companies in provinces, including Guangdong and Hebei. MEP found that as many as half did not comply with the law. As a result, to strengthen compliance and enforcement, MEP has set up a database of violators and encouraged residents to report complaints.

³⁴ The policy documents are the *Provisions on Regional Compensation of Environmental Resources in Jiangsu Province* and the pilot *Program for Regional Compensation of Environmental Resources in Jiangsu Tai Lake Basin*, issued in 2007 by the People's Government of Jiangsu Province.

³⁵ Y Wan, 'Joint Efforts against Water Pollution' *China Daily*, 10 March 2010.

³⁶ Pollutants discharged at higher than legal limits include: chemical oxygen demand of sewage, 15 000 yuan per ton; ammonia nitrogen and phosphorus at 100 000 yuan per ton.

³⁷ T Bie, 'Analysis on the Progress of the New Law for the Prevention and Control of Water Pollution' (2008) 3 *Environmental Protection* 40.

³⁸ Since April 2008, MEP has conducted an investigation on environmental risk of chemical and petroleum enterprises located along key rivers and their tributaries, and of protected areas or upper reaches of drinking water supplies. As a result of the investigation, construction projects in these areas taking place without environmental impact assessments or without facilities for preventing and controlling environmentally adverse impacts were ordered to suspend production. A national information system for environmental risk and chemicals of key industries was set up. See 'MEP conducting environmental risk checking to chemical enterprises along key rivers', *China Securities Journal*, 31 August 2008. For the ongoing process of MEP's environmental risk checking and information system building, see <<http://yjb.mep.gov.cn/yj/>>.



In spite of such measures, the number of environmental accidents continued to rise; 102 in the first half of 2010 compared with 171 for the whole of 2009.³⁹

The accident of Zijin Mining Group Co's acid leak to Ting River in July 2010 provides an appropriate case study for examining the ongoing legal challenges China faces in terms of dealing with water pollution and conflicts.

The case of Zijin acid leaks to Ting River

On 23 June 2010, fish farmers on the lower reaches of the Ting River reported fish deaths to the local government, suspecting that the cause was pollution. Two days later, environmental protection, aquatic production and epidemic prevention experts from Fujian Province confirmed that the fish deaths were caused by water pollution. Zijin Mining Group Co Ltd (hereafter Zijin) was found to have released a total of 9 100 cubic meters of acid into the Ting River on 3 and 16 July. The result was massive kills of aquatic life in the Shanghang and Yongding counties on which more 72 000 residents depend. As a result, on 8 October 2010, the Bureau of Environment Protection of the Government of Fujian Province fined Zijin 9.56 million yuan (\$1.43 million) and ordered the company to take remedial action. Zijin agreed to undertake the required action and undertake measures to prevent future contaminations.⁴⁰

An unintended accident?

Detailed investigation found a long history of illegal action by Zijin and authorities:

- In July 2007, following an investigation into Zijin operations, SEPA issued an official letter to the Securities and Futures Regulatory Commission to urge the Commission to intensify the environmental supervision on Zijin.
- In September 2009, the environmental protection department of Fujian Province found Zijin discharged waste into Ting River that exceeded the legal discharge standards. The department ordered Zijin to correct and treat wastes in a timely manner. This order was not complied with or enforced.
- In May 2010, in its *Surveillance Report of the Environmental Check on Stock Companies*, MEP,⁴¹ listed Zijin as the worst of 11 stock companies ordered to take corrective action to limit environmental risks from their plant within a specified time.
- Fish deaths were reported in the Ting River in early June 2010 and the local educational department issued a public notice to warn children and teenagers not to eat local fish.

The official report⁴² into the cause of Zijin acid leak in July 2010, noted that there had been three major causes for the incident:

1. The isolating film for wastewater storage had cracked which led to acid leaking into the river (experts pointed out that the design and engineering of the isolating film had been a problem).
2. Zijin illegally connected the deposit observation well to the flood discharge well, thereby directly introducing acid into the river. This illegal connection was discovered in 2009 by the provincial environmental protection department and an order was issued to uncouple the wells. Zijin failed to comply.
3. The self-monitoring facility was broken.

Clearly, the Zijin accident was hardly unintended or sudden, but the consequence of long-term and continuous intended violations.

³⁹ 'China's Environmental Accidents Double on Growth Toll', *Bloomberg News*, 28 July 2010.

⁴⁰ Z-Z LAN, 'Messing Up and Fessing Up' *Beijing Review*, October 2010.

⁴¹ MEP Paper No 67, 2010.

⁴² The Bureau of Environment Protection of the Government of Fujian Province publicized the report of causes of the Zijin mining pollution accident on 16 July 2010 on its official website.



Zijin publicised the toxic leaking accident to the stock market on 12 July 2010, nine days after the first leakage. This violated the information disclosure requirements of *Securities Law*,⁴³ *Company Law*,⁴⁴ *Environmental Information Disclosure Provisions* and *Criminal Law*⁴⁵ for stock companies.

Ironically Zijin won the award of 'China's Best Faith Enterprise in 2010'.

Notably, the local government and environmental protection watch dog did not effectively exercise their responsibilities, placing a higher priority on local economic growth and official relationships than proper supervision of enterprises.⁴⁶ This negligence made local government officials also culpable.

It may have been more appropriate to remove officials and apply sanctions earlier rather than wait until the pollution incidents had become critical.⁴⁷

High penalties?

Zijin was fined almost 10 million yuan – the highest fine recorded in the history of environmental pollution control. Some have hailed this outcome as a victory for *LPCWP 2008*, but the most environmental specialists remain sceptical, arguing that the sanctions applied to Zijin should have had an effect on its stocks. Instead Zijin Mining Group Co Ltd stock prices did not decrease after the fine was imposed on 8 October 2010 because investors had expected a much higher fine. According to a report by China Asset Management Co Ltd, the direct economic losses to the company as a result of the pollution incident were only 31.87 million yuan (\$4.78 million). Altogether, the incident cost Zijin little more than 41 million yuan (\$6.15 million). For a company that, in the first half of 2010, generated 13.46 billion yuan (\$2.02 billion) in business revenue and 2.7 billion yuan (\$404.8 million) in net profits and whose total assets are 29.65 billion yuan (\$4.45 billion), the total cost of the incident had little to no impact on operations.⁴⁸

Critics argue that the fine – 30 per cent of the direct cost of pollution under *LPCWP 2008* – is vague and not sufficient to deter violating conducts. The company's long-term violation behaviour and economic gains from violations remain unaccounted for by this penalty. In addition, 'direct loss' lacks technical explanation and practical rules, easily generating disputes and conflicts.

Who compensates the victims?

With regard to losses incurred by the victims of water pollution, local governments compensate 'direct losses' of affected fishing households by buying the dead fish based on market prices. However, 'indirect losses', such as loss of fish stocks and viability of other aquatic businesses – and even loss of a safe drinking water supply – caused by polluted water bodies remain unaccounted for in *LPCWP 2008*.

⁴³ *The Securities Law of People's Republic of China 2005*, amendment of the 1998 version, The Standing Committee of National People's Congress, Order No 43, 27 October 2005 <http://www.gov.cn/flfg/2005-10/28/content_85556.htm>.

⁴⁴ *The Company Law of People's Republic of China 2005*, revised from the amended version 2004, The Standing Committee of National People's Congress, Order No 42, 27 October 2005, see the Chinese text at <http://www.gov.cn/flfg/2005-10/28/>

⁴⁵ *Environmental Information Disclosure Provisions*, MEP, Decree No. 35, 11 April 2007. See the Chinese text at <http://www.gov.cn/flfg/2007-04/20/content_589673.htm>; *Criminal Law of People's Republic of China 1997*, National People's Congress, Order 87, 14 March 1997, National People's Congress.

⁴⁶ Chen Qiang, 'Zijin Mining Pollution Accident: Natural Disaster or Man-made Catastrophe?' *China Youth Daily*, 21st July 2010.

⁴⁷ Several officials have been removed from their posts, including the Shanghang County head, Qiu Heqing, the deputy Shanghang County head, Lan Fuyan, the Director of the Shanghang County Environmental Protection Bureau, Chen Jun'an, and the Director of the Longyan City Environmental Protection Bureau, Lin Lianjin. See MEP proposed resolutions to solve Zijin Mining Pollution Accident, <http://news.xinhuanet.com/society/2010-07/16/c_111961797_2.htm>.

⁴⁸ Lan, above n 35.



Future perspectives

In conclusion, developments over recent years in China's national law and policy concerning water pollution have responded to some key issues of social conflict caused by water pollution, government accountability, entities' liability and citizen's rights. Nevertheless, challenges remain, with the main challenge being a need to strengthen compliance and enforcement.

On the positive side, China has dedicated efforts in this arena, not just in legal and policy areas, but also politically. Since 2004, the Chinese central government has called for an increase in social harmony.⁴⁹ A society in harmony is one of stability and unity, where people are assured of their basic needs for food, health and liberty. The urge to build China into a society in harmony has become a strong political commitment to support the rule of law in combating various types of civil conflicts – among which resolving water pollution conflict is central.

Keywords: China water law, China water pollution law, the case of Zijin, compliance and enforcement of law

⁴⁹ *Decision of the CPC Central Committee on Strengthening the Party's Ruling Ability Construction*. This issue was discussed and passed in the fourth plenary session of CPC 16th central commission on 19 September 2004. This decision is the first that significantly put forward and explained the scientific topic of building socialist harmonious society as one of five missions for strengthening the Party's ruling ability construction before the whole Party.



RETHINKING THE LABOUR CONTRACT LAW OF CHINA

By Wei Qian¹, Yan Dong², Ye Jingyi³

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INTRODUCTION

China has entered its best era for labour legislation from 2007 when the Labour Contract Law (hereof refers to “LCL”) was finally passed by the Standing Committee of National People’s Congress. There is no doubt that the LCL is the most important labour legislation after the Labour Law 1994 was enacted. Compared with the Labour Law 1994 that has provided a set of new rules for the emerging labour market under the reform and opening-up policy, the LCL has adopted a more dedicated and systematic approach. Different with general understanding on contract law, the LCL not only regulates individual employment contract, but, indeed, also restates some of the principle labour standards stipulated by the Labour Law 1994. Moreover, the LCL enjoys a jurisdiction upon collective agreement and informal employment (dispatched employment and part-time workers) as well.

By virtue of this particular nature, the debates around the LCL have emerged nationwide as there are some critics against new floor of labour rights constructed by the LCL.⁴ In fact, the LCL was created to response new and pressing problems emerged during the social and economic development of China society, such as underpayment or no-payment of wages, abuse of probation period, short-term trend of labour contract relationship, deficient ruling on informal

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⁴ The famous debate on the LCL was described as whether the law should provide timely assistant to employees, or should the law perfect the labour standards even better. See Dong Baohua, *The Position of the Labour Contract Law*, *Studies in Law and Business*, 2006 Vol. 3.

employment. However, the LCL has encountered many problems while having been implemented. The skepticism believes that the poor enforcement of Labour Law i.e. the wage payment⁵ is unlikely cured by the LCL.⁶ Apart from its poor enforcement, the rigidity and inflexibility of its mechanic design blocks it from responding to the market reality. The LCL seemly remains its nature under the “command and control” mode.⁷

This paper tries to review the nature of the LCL in neutral manner and to throw some light on the recent amendments of the LCL. This article argues, despite the fact that the LCL is still relatively new in the field of labour relation, the balance of protecting employment rights and flexibility has already been shown. Interestingly, the most recent amendments that are designed to uphold this balance in the fast-changing social context can have uncertain impact up Chinese modern labour market.

I. THE ADVENT OF THE LCL

The year of 2007 has a special meaning to millions of Chinese laborers. In this year, labour legislation was boomed by the promulgation of three important national laws: Labour Contract Law (the LCL), Employment Improvement Law, and Labour Disputes Mediation and Arbitration Law (amendment). Especially for the LCL, it was valued as the most important legislation on labour issues in China, since the enactment of the Labour Law 1994. The promulgation of the LCL made the central government of China to have confidence to pursue social stability and harmony.

Under the structure founded by the Labour Law 1994, the LCL is regarded as a subordinated part to the Labour Law, and surpassed the scope of civil contract law. Being as one of the principles, to protect laborers who are disadvantaged within the employment relationship signalsthe LCL as an important social law.

A. *What’s new in the LCL*

⁵Sean Cooney, Chinese Labour Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China, Fordham International Law Journal, 2007 .

⁶The wage payment is still an important problem in China labour laws. Non-payment and underpayment of wages with intend became a crime by the Amendment of Criminal Law in 2011, and the Judicial Interpretation by the Supreme People’s Court issued in early 2013 made the criminal punishment more feasible and practical.

⁷Anthony Ogus, Regulation: Legal Form and Economic Theory 4, 245-256 (1994).

The LCL in nature is not only a contract law to regulate individual employment relationship, but also, to certain extent, is a labour law with a broad vision which deals with collective agreement and informal employment (dispatched employment and part-time employment). Particularly, as for the collective agreement in China, it was originally regarded as a special contract by the Labour Law 1994. Many Chinese scholars called for a separate legislation to deal with the process of collective bargain and enforcement of collective agreement.

Compared with the Labour Law 1994, the LCL developed the Chapter 3 of Individual Labour Contract and Collective Agreement (see Table I: Structures of Labour Law in 1994 and Labour Contract Law in 2007). The rules on general provisions in relation to labour contract have been further articulated in the LCL. For instance, the lengths of probation period was vaguely stated as no longer 6 months by the former but categorized into three kinds by the latter in accordance with the contract terms; the legitimate conditions for contract termination and dismissal have been further integrated and enriched; protections on employees' dignity and freedom have been clearly interpreted stated by the LCL.

Table I: Structures of Labour Law in 1994 and Labour Contract Law in 2007

<i>Labour Law of 1994</i>	<i>Labour Contract Law of 2007</i>
<i>Chapter 1. General Principles</i>	<i>Chapter 1. General Principles</i>
<i>Chapter 2. Employment Improvement</i>	<i>Chapter 2. Conclusion of Labour Contracts</i>
<i>Chapter 3. <u>Labour Contract and Collective Agreement</u></i>	<i>Chapter 3. Performance and Alteration of Labor contract</i>
<i>Chapter 4. Working Time, Rest and Leaves</i>	<i>Chapter 4. Discharge and Termination of Labor Contract</i>
<i>Chapter 5. Wages</i>	<i>Chapter 5. Special Rules</i>
<i>Chapter 6. Occupational Health and Safety</i>	<i>Section 1. Collective Agreement</i>
<i>Chapter 7. Special Protections on Female Workers and Minor Workers</i>	<i>Section 2. Dispatched Employment</i>
<i>Chapter 8. Occupational Training</i>	<i>Section 3. Part-time Employment</i>
<i>Chapter 9. Social Insurance and Benefits</i>	<i>Chapter 6. Surveillance and Inspection</i>
<i>Chapter 10. Labour Disputes</i>	<i>Chapter 7. Legal Liabilities</i>
<i>Chapter 11. Surveillance and</i>	<i>Chapter 8. Supplementary Rules</i>

<i>Inspection</i> <i>Chapter 12. Legal Liabilities</i> <i>Chapter 13. Supplements</i>	
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There are a number of issues that the LCL is designed to address by the legislature in China:

- (1) Wage arrears or non-pay of other benefits (i.e. overtime wages, social insurance contributions, work-related injuries liabilities by employers) due to the fact the employers refuse to recognize the existence labour contract relationship where the labour contract has not been formed;
- (2) Abuse of probation period;
- (3) Short-term trend of labour contract;
- (4) Rapid growth of informal employment and insufficiency of legal instrument to regulate this particular areas;
- (5) Employment instability derived from (3) and (4).

With regard to the issues stated in Note (1), the heavily effected group is Chinese rural migrant workers. The difficulty to confirm the existence of labour relationship was the major barrier for their wage claims. Although the Labour Law 1994 allows the existence of *de facto* labour relationship,⁸ and has created several rules to ease the burden of proof by the employee, the original scheme to recognize labour relationship remains burdensome for the workers. In order to avoid disputes on wage payment or other right infringements that are led by the determination of labour relationship, the requirement of the written labour contract has strictly required by the LCL.

To resolve the problems stated in Note (3) and (4), the LCL reinforced its mechanism on the open-ended contract, which secured employees of the right to conclude an open-ended contract. The open-ended contract applies to four circumstances, (i) the employee has been working for the same employer continuously over ten years; (ii) when the employer initially adopts the labour contract system, or State-owned enterprises renew their labour contract for transformation to break away from residual impact of the planned economy, the employees could ask for the conclusion of the open-ended contract, when they have been working for the employer continuously over ten years and are no more

⁸Detailed rules refer to Several Opinions on the Implementation of Labour Law (enacted by Ministry of Labour in 1995) and the Notice of Relative Issues on Establishment of Labour Relationship (enacted by Ministry of Labour and Social Security in 2005).

than ten years for legal retirement; (iii) the employee signed twice fixed-term contracts with the employer consecutively, when the contract for a renewal and the employee require to change into the open-ended contract; and (iv) the employer did not sign the written contract with the employee and one year passed, the labour contract relationship should be treated as a open-ended contract. The open-ended labour contract was initially addressed in Labour Law 1994⁹ where one may find a similar statement in relation to the situation of (i). Meanwhile, the (ii) and (iii) are pretty new and can be regarded as the outcome of employment stability policy, and certain concerns about age discrimination¹⁰. Indeed, the rule of (iv) is to stimulate the signing of labour contract.

On the other side, being as another innovation within the LCL, the instrument of economic compensation is extended further. It is no longer merely the compensation to the employee who has been wrongfully dismissed; actually, the economic compensation steps into for the summary dismissal as well so as to promote employment stability. That is, even if the labour contract is terminated as to expiration of its term, the employer should pay the economic compensation to the former employee.

Actually, the LCL has made other attempts to protect the rights of employees. The law introduced the right to know for both sides before the conclusion of a labour contract. In addition, the LCL provides legal regulations on the enterprise work rule, which were usually formulated by the employer unilaterally. The Labour Law 1994 kept silence to the regulation on the code of conduct at work; however, the LCL clarifies its legal procedure that requires employees' participation. Thirdly, the LCL is the first time to specify some of legal instrument for informal employment relationship.

B. Debates on the Law Making Process of the LCL

Indeed, there were a number of hot debates¹¹ during the draft process of the LCL, some of which remain active as five years after. From 2005 to 2007, there were altogether five different versions of the law drafts publicized by the State

⁹ Labour Law of 1994, Article 20.

¹⁰ Another illustration is about contract discharge. The employee could not be discharged in case he/she has been working for the same employer consecutively for over 15 years, and is no more than 5 years away from his/her legal retirement. Labour Contract Law of 2007, Article 42 (5).

¹¹ See serial comments from Steven Cheung, <http://www.doc88.com/p-996190579400.html>. Debates between labour law scholars, see Wang Quanxing, *Debates on the Formation of Labour Contract Law*, China Legal Daily 2006 April 12; Dong Baohua, *Contend and Thought of Chinese Labour Contract Law*, Shanghai Renmin Press, 2011

Council, without mentioning various versions provided by P.R.C. National Federal of Trade Union. After the Labour Law 1994 was passed, the Chinese legislators had designed the blueprint of future legislations including Labour Contract Law, Employment Improvement Law, Labour Disputes Resolution Law, and Social Insurance Law.¹² The original plan was initiated from Social Insurance Law, which was aimed to define the state duties to provide public service of social insurance and clear the institutional obstacles. Thereafter, the LCL takes the role of ensuring the employer's duties and liabilities to be clarified.

The debates or arguments about the LCL concentrated on the following questions: (a) shall employment stability prevail employment freedom or market liberty? (b) shall the law declare to protect laborers unilaterally or protect both parties within the labour relationship? (c) shall the law encourage more administrative interference on the contract relationship? (d) how to balance the regulations dealing with formal and informal employment relationships?¹³

Just as raised by many the critic, questions of (a), (b), and (c) are actually the same one. It is about the goal of the law, whether to pursue the harmony of labour relation through enforcing employment stability, or approach flexibility realized by the market principles.¹⁴

Another criticism is about whether the LCL could care for employees in lower level, since laborers in modern society have developed its own hierarchy. Criticism considered the LCL could not benefit to employees at lower level i.e. migrant workers. Economic compensation provisions could hardly be implemented upon this group. They argued that when the contract is ended by the employer, employees in this level usually would select to leave rather than claim for economic compensation. Only those powerful workers could win in the new law, because they could have strong protection due to high wages and keep employment stability easily.

II. THE BALANCE OF EMPLOYMENT RIGHTS AND FLEXIBILITY

Indeed, unlike the observations raised by many, the author has found the LCL set up new balances in the Chinese labour market. In the macro level, it

¹² Liu Tao and Wang Qi, 2008.

¹³ Dong Baohua, *Contend and Thought of Chinese Labour Contract Law*, Shanghai Renmin Press, 2011 p159.

¹⁴ *Ibid.*

provides choices for the employer to be a “good” labour user since they can enjoy some sort of labour flexibility by forming fix-termed employment or other employment relationship. In micro levels, there are several new instruments for both employees and employers to approach a balanced labour relation by their own means.

A. Contract Signing and Economic Penalty

In order to set up a contract system, forming a written labour relationship is emphasized as a compulsory duty to both the employee and the employer. Since in most cases, it was the employer who refused to sign the contract, the LCL added the instrument of economic punishment to impel a self-enforcement of contract signing. If the employer illegally refuse to sign the contract, even when the employee ask for doing so, the employer should pay the employee one-month wage for each month since the labour relationship was founded.

This fine is not an administrative punishment but a compensation for employee similar to tort liability, which means the employee can benefit from it directly. It is aimed to avoid difficulties and costs to prove the de facto employment relationship. Moreover, it can be helpful to solve labour disputes as to reducing the effects to verify an employment relationship by the authority. With regard to the employer side, restrictive covenant and confidential liabilities could reduce the risks of illegal competition by core workers.

B. Workplace Rules

Workplace rules within an enterprise were early regulated by the law. Prior to the establishment of Labour Law 1994, workplace rules had to be made in a democratic process where the workers representatives and trade union could participate to the co-determination. Labour Law 1994 changed this rule. It only articulates that workplace rules should be formulated in accordance with law, and the opinion from the trade union should be heard during this process. This loosely worded provision was proposed to release enterprises from original restrictions, and served for the policy of business freedom.

The LCL restates the principle in relation to workplace rules. In accordance with the LCL, the legitimate validity of workplace rules is determined by its rule-making process, in which the voices from the employees’ side or their representatives the trade union. This change is made to balance powers of employees and employers, and improve industrial democracy.

C. Penalty for Contract Violation

Similar with the economic measures applied to labour contract formulation, penalties including compensations and fines imposed on any violation to the labour contract are also strengthened the economic punishment. A penalty equals to one or two months' wage calculated months is directly endowed to the employee once the employer violates the duties on the labour contract. But the amount of the penalties made the balance again.

In order to protect the employee, the compensation or fine amount could not lower than the local minimum wage for per month. To avoid unfairness to the employer, different compensations could not applied together, which means if the employee selected one favorite compensation (for example double wages fine for illegal discharge), he could not ask for other compensations at the same time.

In addition, if the employee's wage is too high (three times higher than average local wage level), the compensation he could claim for is limited up to three times wage for per month and no more than 36 months wages for the total amount.

With regard to restrictive convent, the agreement shall not exceed two years, which is shorter than previous term of 3 years, which was provisioned in labour rules by Ministry of Labour.

D. Restrictive Convent

In order to secure the trade secrets and intellectual property, the LCL articulates confidential obligation on the employee. However, the obligation is not unlimited. The applied scope is only limited to employees of senior management, senior technicians and other personnel important.

As the consideration of employees' confidential liability, the employer has to pay economic compensation to the employee on a monthly basis, during the term of the competition restriction after the termination of the employment contract.

The LCL states nothing about the compensation in details, although it requires the compensation should be reasonable compared with the employee's wage level. It leaves the problem to the local government, so as to balance different economic development level of locals. In most locals, the compensation is as from 20% to 60% of wage payment, i.e. Zhejiang and Guangdong are 50% of the wage payment, other than agreement with higher amount between both parties.

E. Dispatched Employment

The balance between the employer and the employee also shows in the provisions of dispatched employment. In order to protect employment stability of dispatched workers, the fixed-term labour contract no less than 2 years is required by the LCL. By the law, dispatched works shall have a wage payment no less than local minimum wages even for the time period when they are not dispatched.

Another balance appears in the liability relocation. The real user of dispatched workers has to provide onsite protection and working conditions to the dispatched workers. Different to other countries, the liabilities imposed on the real user of dispatched workers are regarded the same with the employer, who concludes labour contract with the employee directly. Especially when the employee gets loss from the violation of the labour contract from the employer or the real user, both the employer and the real user are imposed the conjoint liability to the employee, so as to balance interests of each party within the unique relation.

III. REBALANCE, REGULATION ON DISPATCHED EMPLOYMENT

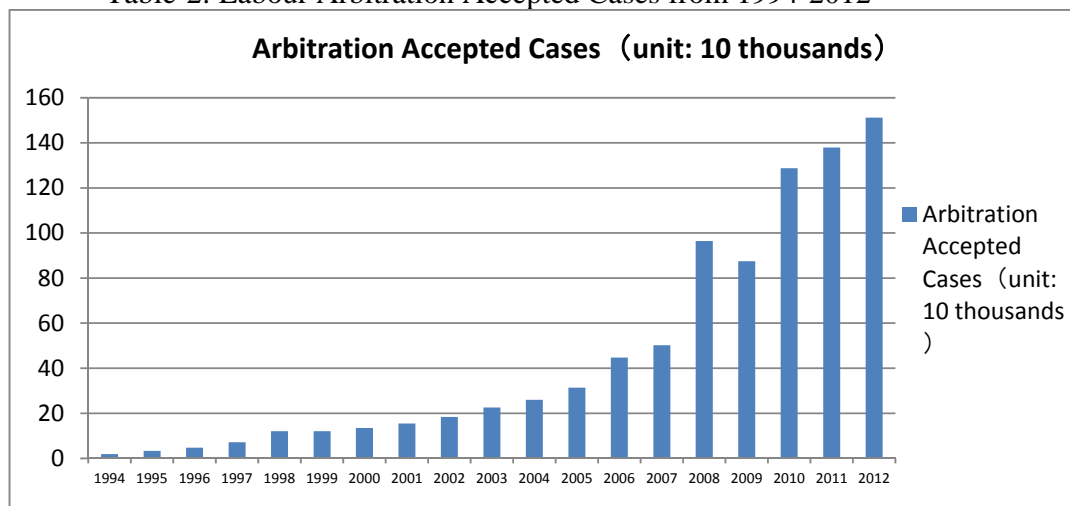
After five years implementation of the LCL, a number of new phenomena emerged from Chinese labour market. Speaking positively, the ratio of signing labour contract has increased dramatically, due to the server penalty upon the employer who failed to form labour contract with employee. In accordance with a latest research,¹⁵ within enterprises of more than 1000 employees, the labour contract signing rate has reached 89%. By official statics, the rate of large-scale enterprises was 94% in 2010.¹⁶ It was found that the high signing rate is helpful to the employment stability, and the trade union played a very important role in such changes. Now the fix-termed contract is three-year contract usually, and social insurance benefits especially for the medical insurance are better protected as a side consequence.

However, the dark side of story, which has been frequently referred by many commentators, is twofold. First, the increase of labour dispute cases in last few years is alarming (see table 2). Second, the use of labour dispatching workers became out of control. The latter seems particularly worrisome for the top legislature in China.

¹⁵XuDaowen, Labour Contract and Its Effect of Protecting Rights- Based on Survey Data of Nine Cities, Hebei Law Science, 2011 July, Vol. 29 No. 7.

¹⁶Survey Report of Migrant Workers in Zhujiang Delta Zones, Zhujiang Economics 2007.

Table-2: Labour Arbitration Accepted Cases from 1994-2012



Notes:

- (1) The statistics is based on annual data release by Ministry of Human Resource and Social Security of China.
- (2) Data from 2008 includes labour disputes accepted by the mediation process.

Therefore, the Standing Committee of the National People's Congress launched its revising project in 2011 and finally enacted an amendment for the the LCL curbing the widespread of labour dispatching service in 2012. It is a record-breaking speed in Chinese labour legislation history as a new labour subject to any amendment. It not only shows the urgency of dealing with issue of labour dispatching service but also illustrates the determination of central authority to drive the labour market back on "track".

The amendments of the LCL focus on five aspects. First, the threshold of entering labour dispatching business has been clearly lifted. The requirement of the deposit for registering a labour dispatching business is 2 million RMB instead of 500,000 RMB in the original the LCL. Second, the registration of a labour dispatching company is subject to the pre-approval of labour authorities prior to entering into formal procedure of registering a company. Third, some clarifications have been made upon the terms of "temporary, auxiliary, or substitute positions". Fourth, the amendment of the the LCL has reemphasized and polished the equal pay principle for the dispatching workers. Fifth, the legislator authorizes the Ministry of Human Resource and Social Security to decide a cap for maximum portion of headcounts for dispatched workers in any company.

It is not unreasonable for the government to put labour dispatching service under strict scrutiny in order to protect the rights of dispatched workers. Lifting up the threshold to entering labour dispatching business is definitely a way to ensure those well-established entities providing employment service. Moreover, the pre-approval requirement is an instrument for the labour authorities to step in as to screen out those unfitting employment providers.

Meanwhile, it seems a healthy movement to address some of the terms that appears vague in the previous legal text. During and after the process of drafting the LCL, many commentators have pointed out the unclearness in the clauses of labour dispatching section might lead to abuse of labour dispatching service. As the amendment of the LCL has made some sort clarification on the “equal pay” principle, the dispatched workers can have better chance to receive sufficient protection. The specification for the terms of “temporary, auxiliary, or substitute positions” is another tool to reduce the possibility for the employer to abuse the labour dispatched workers.

However, the quota for the amount of dispatched worker imposed upon a company has an uncertain impact on labour dispatching business. So far the authority has not yet hamper out any indication on the quota in question. There are widespread speculations amongst commentators on Chinese market. On the one hand, if the quota is too loose, there is a worry that the abuse of labour dispatched activities may not be curbed. On the other hand, if the quota is too tight, the entire labour dispatching service might be frozen. Therefore, it is a subtle approach for the government to make a final decision.

CONCLUSION

The advent of the LCL leads Chinese labour regulations into a new era. Since the LCL is a new instrument for over 400 million workers, it is unsurprising that there is a great deal of debates amongst various commentators. The legislature of the the LCL has made great efforts to enhance the protection of workers. However, the critics pointed out the level of protections may be too heavy for the employers to share.

This article argues any reviews of the LCL shall put this instrument into Chinese context. It is necessary to take the social context five years ago when looking at the establishment of the t LCL. As being illustrated, the then the LCL has create a rather balanced protection for both workers and employers. Five years later, whilst new phenomena have emerged interfering such balance, the

legislature has made prompt response to readdress. Most movements made by the LCL amendment are rather positive, such as clarification of vague terms. It may be too early to judge the real impact of the amendments as the administrative quota upon amount of dispatched workers in a company has not been finalized.

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Corporate Criminal Responsibility in China: Legislations and Its Deficiency^{*}

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ABSTRACT

The Chinese corporate criminal responsibility is featured by the “Double Punishments” imposed both on the Unit who commit a crime and the persons who are directly in charge. As an attributable liability, corporate criminal responsibility requires more precise and detailed principles of attribution in the national criminal law. Unfortunately, it has not archived yet in Chinese Criminal Law. As well, at current, only one kind of monetary penalty, the fine, can be imposed on the Unit who commit a crime. It is far from enough to prevent corporate offences. On enumerating and analyzing Chinese criminal legislations concerning corporate criminal responsibility, the author finds the main deficiency in it and recommend on how to perfect it.

Keywords: Corporate Responsibility; Corporate Crimes; Chinese Criminal Legislations and Deficiencies

1. Introduction

Since the establishment of People’s Republic of China in October, 1949, it is not a long history in Chinese legal system to criminalize the corporate crimes committed by legal persons. Because it was the planned economy instead of free market that predominated in China before the Reform and Opening-up policies applied in 1978. As a result, the legal persons or legal entities were not allowed to operate independently in free market as a legitimate civil subject which has the legal capacities to enter into the relations with the other civil subjects for its own interests and take responsibility by its own assets. On the contrary, the corporations, the enterprise and the other kind of legal entities were all state-owned, only can act as the subordinate to the State and for the interest of the State. Consequently, there were no corporate crimes at that time. That’s why there were no provisions for corporate crimes in the 1979 Code of Criminal Law of P. R. China.

With the economic reform and opening-up in China, the state-owned enterprises and units began to separate gradually. Meanwhile, with the existence of allowed private economic sectors, more and more private capital shifted into the market. As a result, the private companies, foreign joint ventures and wholly owned companies,

shareholding companies, limited liability companies, social organizations and other economic forms of organization emerged. However, the crimes or offences committed by legal entities also increases. In view of this, the new Criminal Law of P. R. China, revised at 1997 (Hereinafter China 1997 Criminal Law) extends the jurisdiction over the corporate crimes. However, according to Chinese legislations, the “legal persons” is generally limited to the organization with certain qualifications, including an independent property and limited liability, the scope of which is smaller than the “organization” or “Unit”. In China, the term of “Organization” or “Unit” has more broad meaning. The “Organization” generally means any kind of entities, groups especially those in private sectors which are organized loosely, whereas the term of “Unit” includes not only any companies, enterprises, institutions and organizations, but also some entities in public sector, such as the state organ which is the organ of state authorities or administrations. It seems that the “Unit” is more suitable for the true situation in China because in some circumstance, the state organ can be criminal subject, although there are some debates on this point. That is why in the Chapter IV of “General Provisions” in China 1997 Criminal Law, it is titled as “The Crimes committed by a Unit” instead of corporate crimes. For this reason, in China, we use “Crimes committed by Unit” refer to the “corporate crimes”.

In spite of establishment of the corporate criminal responsibility in the Chinese criminal law, there are a num-

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ber of administrative acts and regulations providing the corporate administrative responsibility for their wrong-doings. Those regulations expressly authorize the competent Administrations to take administrative measures to impose the sanctions—including fine—on the corporations and the other legal entities for their violations and wrong-doings. If the legal persons not only violate the administrative regulations but also the criminal law, they shall be subject to criminal sanctions, and criminal liability.

2. The Legislations with Respect to the Corporate Criminal Responsibility in China

In China, in addition to some clauses in the “General Provisions” and “Specific Provisions” of China 1997 Criminal Law and its amendments, the legislations with respect to Corporate criminal responsibility also consist of the valid judicial interpretations mainly from the Chinese Supreme Court which can be viewed as the sources of law and also the legislations. As for the corporate criminal responsibility, up to now, those judicial interpretations include the “Supreme Court interpretation on the specific issues related to the application of criminal law in hearing criminal cases involving crimes committed by units” (Supreme Court Interpretation No. 17/1999) and the “Supreme Court interpretation on the question of whether or not, in hearing the cases of crimes committed by a unit, should distinguish principal criminal or the accomplice between the persons who are directly in charge and the other persons who are directly responsible for the crime” (Supreme Court Interpretation No. 31/2000).

As a principal reference for judges in hearing the criminal cases, the explanatory documents from Supreme Court play a very important role in practice, although they are not the source of law and not binding in China. Regarding the corporate criminal responsibility, we can find the *“Explanatory document from the research institution of Supreme Court on the issues related to the application of law in hearing the criminal cases involving the crimes committed by the foreign companies, enterprises and institutions within the territory of P. R. China”*.

In order to give the outline of how is the corporate criminal responsibility established in the legal system of China, I will introduce those provisions at first, and then, conclude the main characteristics and deficiencies.

2.1. Provisions in the Criminal Law of People’s Republic of China

In the “General Provisions” of the Criminal Law of the People’s Republic of China, there is a specific section for

the criminalization of the corporate crimes—that is, the Section 4 “Crimes Committed by a Unit,”—which consists of Article 30 and Article 31. They provide as follows:

Article 30 Any company, enterprise, institution, State organ, or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility. Article 31 Where a unit commits a crime, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be given criminal punishment. Where it is otherwise provided for in the Specific Provisions of this Law or in other laws, those provisions shall prevail.

In the “Specific Provisions” of the Criminal Law of P. R. China, after 8 amendments, the number of the counts of crimes which can be committed by a unit, increases to 124. According to the latest Amendment VIII to the Criminal Law of P. R. China, they mainly can be found in the Chapter III “Crimes of Disrupting the Order of the Socialist Market Economy”¹ and the Chapter VI “Crimes of Obstructing the Administration of Public Order”² as well as several individual Articles.³

2.2. Corporate Criminal Responsibility in the Judicial Interpretations

As mentioned above, the legislations of corporate criminal responsibility also include the relevant judicial interpretations. At current, they consist of two interpretation documents from Chinese Supreme Court: the Supreme Court Interpretation No. 17/1999 and Supreme Court Interpretation No. 31/2000. They provide some detailed criteria about how to judge the corporate crimes in the application of law.

The provisions concerned in “Supreme Court interpretation on the specific issues related to the application of criminal law in hearing criminal cases involving crimes committed by units” (Supreme Court Interpretation No. 17/1999).

The Supreme Court of P. R. China interpreted as follows:

1) *The “companies, enterprises and institutions” provided in Article 30 of the China 1997 Criminal Law, include not only state-owned, collectively owned compa-*

¹The Chapter III in the Part Two “Specific Provisions” of the Criminal Law of P. R. China consists of 8 Sections, from Article 140 to Article 231 a, which includes 110 counts of crimes. Most of them can be committed by Unit.

²The Chapter VI in the Part Two “Specific Provisions” of the Criminal Law of P. R. China consists of 9 Sections, from Article 277 to Article 367, which include 120 counts of crimes. Only some of them can be committed by Unit.

³Two counts of the crimes committed by a unit added by The lasted Amendment VIII to the Criminal Law of P. R. China, are contained in Article 276(a) and Article 205(a).

nies, enterprises, public institutions, but also legally-established joint ventures, cooperative enterprises as well as those private or wholly-owned companies, enterprises and institutions which are qualified as legal persons.

2) *The crimes committed by those companies, enterprises and institutions which were established by individuals to commit the crime, or the companies, enterprises, institutions which commit crimes as the main activities since their establishment, shall not be criminalized as the crimes committed by unit.*

3) *If the individuals commit a crime falsely in the name of the unit and distribute the proceeds from this crime under the table, shall be criminalized as the crime committed by natural persons and punished in accordance with the Criminal Law [1].*

The provisions concerned in the “Supreme Court [1] interpretation on the question of whether or not, in hearing the cases of crimes committed by a unit, the persons who are directly in charge and the other persons who are directly responsible for the crime should be distinguished between principal criminal and the accomplice.” (Supreme Court Interpretation No. 31/2000).

In this document, the Supreme Court gave the following interpreted opinion on the question concerned:

In hearing the cases of the crimes committed by a unit, shall condemn the persons who are directly in charge and the other persons who are directly responsible for the crime separately, in accordance with their role in committing the crimes, don't have to distinguish between principal criminal and the accomplice [2].

Corporate Criminal Responsibility in the “Explanatory document from the research institution of Supreme Court on the issues related to the application of law in hearing the criminal cases involving the crimes committed by the foreign companies, enterprises and institutions within the territory of P. R. China”.

As mentioned above, the explanatory documents play a very important part in judicial practice in China. It is also true in hearing the cases concerning the corporate crimes. In this document, the Supreme Court holds that:

Within the territory of P. R. China, the foreign companies, enterprises and institutions which can be qualified as the Legal Persons in accordance with the Chinese law, commit the offences of endangering society which can be criminalized as a crime according to the Criminal Law of China, shall be held the corporate criminal responsibility in the light of the provisions of the crimes committed by a unit in the Criminal Law of China.

The crimes committed by the foreign companies, enterprises and institutions which were established by individuals to commit crimes or offences within the territory of P. R. China, or, since the establishment, the foreign companies, enterprises and institutions have committed

crimes within the territory of P. R. China as their main activities, shall not be criminalized as the crimes committed by unit [3].

3. The Types of Corporate Crimes in the Criminal Law of China

The “Specific Provisions” of the Criminal Law of P. R. China, provides 124 counts of crimes which can be committed by Unit. We can divide them into two types: the Single Crimes Committed by a Unit, and Non-Single Crimes Committed by a Unit [4].

3.1. The Single Crimes Committed by a Unit

In the criminal law of P. R. China, the Single Crimes Committed by a Unit refers to the crime which only can be committed by unit, other than natural persons. That means, only the unit can be the criminal subject of those kinds of crimes. For example, the crimes established in Article 327 of the Criminal Law of P. R. China which reads that “*Where a State-owned museum, library or other institution sells or presents as gifts without permission any cultural relics in its collection, which is under State protection, to any non-State-owned institution or individual, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the offence shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.*”

3.2. Non-Single Crimes Committed by a Unit

Non-Single Crimes Committed by a Unit refers to the crimes can be committed by unit and also individuals, namely, the natural persons. In the “Specific Provisions” of the Criminal Law of China, most of the crimes committed by unit are Non-Single Crimes Committed by a Unit. In these cases, for those natural persons who committed these crimes, some clauses provide the same punishments as imposed on the persons who are directly in charge or directly responsible for the crimes committed by a unit. For example, Article 187 provides that:

Any employee of a bank, ..., shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined...; if especially heavy losses are caused, he shall be sentenced to fixed-term imprisonment of not less than five years and shall also be fined... Where a unit commits the crime mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished according to the provisions in the preceding paragraph.

Whereas, the other provisions impose the heavier punishment on those natural persons who commit those

crimes. For example, Article 191 provides the natural persons, whoever commits the crimes of money-laundering, “...; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than five but not more than 10 years...”, but “Where a unit commits any of the crimes mentioned in the preceding paragraph, ...the persons who are directly in charge and the other persons who are directly responsible for the crime shall be sentenced to fixed-term imprisonment of not more than five years... [5].”

4. The Characteristics of Corporate Criminal Responsibility in China

From the provisions listed above, we can conclude the following characteristics of corporate criminal responsibility in Chinese criminal law:

4.1. The Criminal Subject

The criminal subjects of corporate crimes, the Unit, includes any company, enterprise, institution, State organ, or organization, according to the Article 30 of the “General Provisions” in China 1997 Criminal Law.

This provision, however, arise some debates which mainly focus on the conception of a “Unit” and the question of whether the state organ can be the criminal subject of the crimes committed by unit [6] and whether the company established by individuals can be the subject of the crimes committed by a Unit [7].

Because of no defining the conception of the term of “Unit” who commit a crime in Chinese Criminal Law, in practice, it is ambiguous to decide which entities can be criminalized as a Unit who commit crime, such as the branch of a company with legal personality.

As for whether the state organ can be the criminal subject of the crimes committed by unit, most scholars hold that, the state organ cannot be the criminal subject of corporate crimes. The main reasons depend on that the state organ is the organ of state which is subordinate to the state and function as a public actor on behalf of the state, without any possession of the property or funds on which that state organ can bear its responsibility independently. Consequently, if the state organ can be the criminal subject of the corporate crimes and sentenced to the monetary penalty, it is in fact a self-punishment. To some extent, it is true, in my opinion, but it is also necessary to prescribe the state organ as the criminal subject of the crimes committed by unit. Because in practice, it actually exists that the state organs commit the crimes in the name of that organ.

Regarding the private company established by individuals, some people hold that they cannot be criminalized as the Unit who committed crime on the ground of that those kind of companies are owned by individuals,

the natural person, the offences committed by that company finally should be deemed to be the offences committed by that natural person, the owner. In my opinion, however, although the private companies are actually owned by natural persons, but the assets of that company is independent of the private property of that owner [8]. They are different actors in performing the economic activities. So, we should differentiate the behavior of the companies from the action of their owner. They should be responsible for their behavior separately. For this reason, if the offence is committed by the company—on behalf of it and for the benefit of it—this offence should be criminalized as the offence committed by a Unit.

4.2. Double Punishment-Based Responsibility

In Chinese criminal law, the corporate criminal responsibility is featured by the “Double Punishments” imposed both on the Unit who commit a crime and the persons who are directly in charge and responsible for the crime. The Article 31 of China 1997 Criminal Law establishes this style responsibility for corporate crimes and also provides the related penalties. For the Unit who commit a crime, should be fine; for the persons who are directly in charge and the other persons who are directly responsible for the crime shall be given criminal punishment, including the monetary penalty and imprisonment. Accordingly, at current, only one kind of monetary penalty, the fine, can be imposed on the Unit who commit a crime, whereas the other penalties such as disclosure of the companies, suspending from some business operations, exclusion from participation in a procurement, all can be imposed as the administrative sanctions by the authorities according to administrative regulations.

However, the exception clause also contained in this Article which can be found in the following sentence, “...Where it is otherwise provided for in the Specific Provisions of this Law or in other laws, those provisions shall prevail.” This clause, in my opinion, on the one hand, indicates the possibility in some circumstance for providing the single punishment only on the Unit who commit a crime, or the persons who are directly in charge or directly responsible for the crime. On the other hand, it leaves the space for developing new penalties in the future except for the single monetary penalty currently imposed on the Unit who commit a crime.

5. The Deficiency in the Legislations Concerning Corporate Criminal Responsibility

After analyzing the legislations about the corporate criminal responsibility in China, I put some questions on which the Chinese Criminal Law keep silent. From another perspective, it reflects the defects existed in our

criminal law.

5.1. Whose Act Can Be Attributable to the Unit Who Be Defined to Commit a Crime?

For this question, we can conclude from the wording in Article 31 of China 1997 Criminal Law that the conduct from the persons who are directly in charge and the other persons who are directly responsible for the crime can be attributable to the Unit. However, the question is which kind of people should be defined as the “persons who are directly in charge” and “the other persons who are directly responsible for the crime”, the legal representative, the officials in management, the owner, or the persons who actually control the company, enterprise and the other private organization, or the persons in common position but acting on behalf of the unit and for the benefit of this unit?

As we see, the provisions in Chinese Criminal Law keep silent on this question. They are too basic to be used as the sufficient legal basis to define the crimes committed by a Unit, but those cases actually happen in practice, especially in the cases of the crimes committed by the persons in the giant companies which are organized complicatedly with the sophisticated structure.

5.2. Which Kind of Conduct Can Be Defined as the Crimes Committed by a Unit?

Although our code of Criminal Law keeps silent in this point, we can find the indirect answer in the judicial interpretations and documents from Supreme Court, such as the “Supreme Court Interpretation on the Specific Issues Related to the Application of Criminal Law in Hearing Criminal Cases Involving Crimes Committed by Units” (Supreme Court Interpretation No. 17/1999). In the Paragraph 3, it provides that “*If the individuals commit a crime falsely in the name of the unit and distribute the proceeds from this crime under the table, shall be criminalized as the crime committed by natural persons and punished in accordance with the Criminal Law*”, which seems indicate if act on behalf of the unit and the illegally obtained proceeds owned by that unit, should be defined as the crimes committed by a unit. Furthermore, It is clarified in the “Supreme Court Minutes of a Panel Discussion on the Legal Issues in Hearing the Cases Concerning Financial Crimes” that “if act on behalf of the unit and the illegally obtained proceeds owned by that unit, should be defined as the crimes committed by a unit” [9].

With the judicial interpretations and the Supreme Court documents mentioned above, it seems to come to this conclusion: if an act would be attributable to the crimes committed by a Unit, it should be acting on behalf of the Unit, the proceeds which illegally obtained from

that act should be owned by that unit [10]. In my opinion, it reveals a more detailed principle of attribution to the crimes committed by a unit—the corporate crimes in China, but it is debatable for the following reasons:

First, who can act on the behalf of the Unit, the officials of management in the Unit or the common employee? And which kind of act can be regarded as the act on behalf of the Unit, the act on their duty or the employ’s act should meet some requirements so as to let the Unit know? They are very important to decide the corporate crimes [11], but as mentioned above, our criminal legislations and interpretations keep silent.

Second, on the wording and context of Chinese law, “the proceeds illegally obtained from that act” generally means those visible proceeds which are obtained from the crimes directly or indirectly. It is true for some cases of the crimes committed by unit, such as the Unit commit the crimes of money-laundering, the unit commit the crimes of acceptance of bribes. However, in practice, in some cases of the crimes committed by a unit, the unit actually benefits from that crime, but that benefit may not always be visible proceeds. Sometimes, they are invisible interests, for example, through those illegal activities to improve social status and the reputation of that unit, or secure a competitive advantage and the business opportunities. Those interests maybe turn into the real visible proceeds in the future. However, at current, if charge the unit commit a crime, possibly it couldn’t meet the requirement of “the illegally obtained proceeds owned by that unit” because the interests derived from that crime and benefit that unit maybe not yet turn into the money, the assets and the other kind of visible proceeds. For this reason, comparing with “the illegally obtained proceeds owned by that unit”, “for benefit of that unit” seems to be a more appropriate requirement for defining the cases of the crimes committed by a unit.

6. Conclusions

As mentioned above, through the detailed enumeration and in-depth analysis of the Chinese criminal legislation on the crimes committed by a Unit, we can see the trend of that the number of the counts of corporate crime is growing, but the provisions are very simple and basic as follows:

Firstly, As an attributable liability, corporate criminal responsibility requires more precise and detailed provisions in criminal law, including the criminal subject, *mens rea* requirements and the principles of attribution. Unfortunately, however, it has not been archived yet in Chinese Criminal Law. As a result, this is the one of the reasons why in practice, the offences prosecuted as the crimes committed by Unit is less than actually existed in China.

Secondly, the penalty for corporate crimes is very simple. Only fine can be imposed on the wrongfully-doing corporations. It is far from enough to prevent corporate offences. Thirdly, the criminal legislations of the crimes committed by Unit are complemented largely by judicial interpretations, the explanatory documents and the other kind of documents like Minutes. Those documents are less authoritative than national criminal law. This is not good to prosecute and try corporation offences.

In order to ensure the impartiality in trial and fight against corporate crimes effectively, I suggest to take following actions to remedy the deficiencies in Chinese Criminal Law:

First of all, make the detailed uniform provision in Chinese Code of Criminal Law which should precisely define the criminal subject of the crime committed by Unit, the *mens rea* requirements of that crime and the principle of attribution.

Second, add the other penalties such as disclosure of the companies, suspending from some business operations, excluding from participation in procurement and the measures to enforce the company to change their internal structure to establish self-control system [12]. Although in China, due to a large number of administrative single acts regulating the corporate offences in addition to criminal law, those penalties can be imposed by different responsible authorities on the wrongfully-doing corporations as an administrative sanction. However, because those administrative regulations are single and disperse that there is no uniform administrative regulation providing the uniform requirements on the corporate offences, different authority has different understanding on how to judge the corporate offences. As a result, some wrongfully-committed corporations go beyond the arm of the law.

For this reason, the detailed uniform provisions of corporate crimes in Chinese Code of Criminal Law surely become an important guide and reference for administrative authorities in their practice to investigate corporate offences. That's why I recommend to perfect the related provisions in Chinese Criminal Law.

As well, with the economic development in China, the number of legal entities is growing. Consequently, the corporate offences become more and more, the structure of modern corporation become more complicate. They pose the threat to stability of societies and security of economies, challenging the justice and fairness. In order to fight against transnational crimes, the Chinese government adopted some international conventions contained the responsibility of legal persons and then take the obligation to implement them in Chinese law. So, it is necessary and significant to do something for the research on the Chinese legislation concerning corporate offences, making them more equitable and perfect.

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Recent trends in evidence law in China and the new evidence scholarship*

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This paper reviews the history and status quo of evidence theory in China, and analyzes its gradual shift from a pluralistic evidence law to a model informed by scientific evidence scholarship. It compares fundamental distinctions on evidence and judicial proof between the contemporary evidence theories of China and those in Anglo-American law. The paper reveals that no matter what the evidence system is, the common method of discovering truth plays an important role in the modernization of evidence theory as such theory moves towards a comprehensive evidence scholarship. By shedding light on the theoretical framework of a comprehensive evidence scholarship and the increasing use of scientific ideas in evidence law, our theoretical perspective shows that the framework of a comprehensive evidence scholarship consists of four interdependent and overlapping components.

Keywords: Chinese evidence law, comprehensive evidence scholarship, theoretical framework of evidence, free evaluation of evidence, of judicial proof

1. Introduction

The Chinese legal system is the oldest legal tradition in the world. The long history of China provides many legal theories, and this includes evidence theory. In recent decades, the rapid development in the economics and society of China has aided in laying a good foundation for scientific research in almost every academic field. It has also resulted in breakthroughs in the field of evidence. Because of the political system, culture and even language barriers, foreign scholars find it hard to understand the significance of Chinese evidence theory. This paper elaborates the history and *status quo* of Chinese evidence system.¹ We conclude that the development of evidence theory in China experienced a course of moving from integration to separation between evidence scholarship and evidence law, and now is shifting to a comprehensive evidence scholarship from the earlier pluralistic evidence law. The goal of this paper is to compare the *status quo* of the contemporary evidence theory of China and Anglo-American jurisdictions to demonstrate that no matter what the procedural system, the common method of discovering truth must play an important role in the modernization of evidence theory if it is to become a comprehensive evidence scholarship. This paper's analysis of certain aspects of the *ad hoc* nature

* The reader should note that the concept of “new evidence scholarship” used in this paper is different from the expression “new evidence scholarship” coined by Richard O. Lempert in his article *The New Evidence Scholarship: Analyzing the Process of Proof* (1986) 66 *Boston University Law Review* 439.

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¹ The expression “Chinese Evidence System” is used in this paper only indicates the evidence system of mainland China.

of a comprehensive evidence scholarship and its theoretical framework suggests a direction for the advancement of evidence theory.

2. History and *status quo* of Chinese Evidence System

2.1 A Brief Review of the Development of the Chinese Evidence System

In the Chinese Western Zhou dynasty (1046-771 BC), a method named *Five-Listening* had been used to distinguish whether the statement of a witness or a defendant is true or false in the trial.² The official evidence law of China, however, originated from revising the law in the late Qing Dynasty (1636-1912), which mainly involved transplanting the legal systems of Germany and

Japan. In 1906, Mr. Shen Jiaben (1840-1913) and Wu Tingfang edited the first special procedural

law draft in the history of China: *the Qing Imperial Code of Civil Procedure*, but this did not come into effect owing to objections from local governments. In 1911, *the Qing Imperial Code of Criminal Procedure* was promulgated to establish the evidence system. However, it lost its validity along with the collapse of the Qing Dynasty. At this point, the national government carried out the unified law amendments, promulgated in 1928 as part of which *the Criminal Procedure Law of the Republic of China*, which included nearly a hundred evidential stipulations. The major efforts in translation of continental laws resulted in the evidence system of China being deeply influenced by the law-making traditions of the Continental legal system from the beginning.

The establishment of the People's Republic of China in 1949 brought with it a more Soviet-influenced system of socialist law. First, the People's Republic of China abolished the *Six Codes* of the Kuomintang, and banished almost all of the legal resources accumulated during the period of the Kuomintang.³ At the same time, for political reasons, many legal theories of the Soviet Union became influential in China, and research on evidence law was not an exception. For example, one of the important books was *Theory of Judicial Evidence in Soviet Law* written by Andrey Vyshinsky. Vyshinsky argued that confession is the most powerful type of evidence. Thus the Chinese system accepted the principle that a confession provides enough evidence for conviction. One of the principles of Vyshinsky's theory was that criminal law is a tool of the class struggle, and thus that Western evidence law and theory were suspect. And an evidentiary system of Seeking Truth from facts which was established based on the Ideological Line of the Communist Party of China (CPC). It required that facts in issue must be established beyond all

² *Five-Listening to* is also called "*Five-Listening to litigation*". According to the record of *Zhouli · Qiuguan · Xiaosikou*, the first is to observe his words; the second is to observe his facial expression; the third is to observe his complexion; the fourth is to observe his sense of hearing and the fifth is to observe his eyesight. Combining above methods can help one to judge whether the statement of witness or defendant is true or false.

³ The Kuomintang, also called *Nationalist Party*, is a political party of China organized after the Republican Revolution of 1911-1912, by which the Qing (Manchu) dynasty was overthrown. In the summer of 1912 Nationalist leaders Sun Yat-sen and Sung Chiao-ren (Song Jiaoren) merged several revolutionary groups to form the Kuomintang, with Sun as its leader. Defeated by the Chinese Communist Party in the Civil War, the Kuomintang and remnants of its armies withdrew in the summer of 1949 to the island of Taiwan. The Kuomintang has become the governing party again in Taiwan area since Ma ying-jeou won the election in 2008. The Six Codes which refers to the six main legal codes that makes up the main body of law in Taiwan and Japan is the simple name of legal system of the Kuomintang government. It includes the Constitution, the Civil Code, the Code of Civil Procedures, the Criminal Code, the Code of Criminal Procedures, and Administrative laws. The Central Committee of the Communist Party of China issued *Instructions on Abolishing the Six Codes of the Kuomintang and Determining Judicial Principles of Liberated Areas* on February 22, 1949.

doubt.⁴ The principle of presumption of innocence and the method of free evaluation of evidence were criticized, and regarded as decadent capitalist theories. In short, the law at that time had become an appendage to politics, and was used as a tool for class struggle.

With the Cultural Revolution (1966-76), however, all legal work was suspected of being counter-revolutionary, and the legal system completely collapsed.⁵ The resulting damage to the legal system was profound. During the movement, schools were closed and students were encouraged to join Red Guard units, which denounced and persecuted Chinese teachers and intellectuals. Judicial systems all over the country were destroyed, torture became common, and it is estimated that about a million died in the ensuing purges and related incidents. It seems that the evidence system disappeared without a trace during this period: courts were destroyed, the procedure of law was not carried out and scholarship for legal research was suspended.

The Chinese legal system was rebuilt right after the Cultural Revolution. The most important example is the *Criminal Procedure Law of the People's Republic of China* issued in 1979. Because of the continuous influence of ideology from the Soviet Union, the 'super-inquisitorial mode' was established as the basis for procedure. Under this mode, the courts were responsible for finding the truth, burden of proof on parties was not emphasized, and the submissions of the parties did not place any constraint on the judge's decision-making. The principle of the evidence system in this period was *To Seek Truth from Facts*, which required the police, prosecutors and judges to be loyal to the *Truth of Facts* jointly.

The collective process of proof was regarded as a subjective and cognitive one of people reasoning about objective things. It was very difficult for this principle to guide lawmaking and judicial practice because the emphasis on subjective methods of cognition was taken to mean that there was no need for any rules of evidence. As a result, there were no more additional clauses for evidence in the criminal procedure law amendment in 1996. In the early 21st century, two legislative acts on civil and administrative evidence were promulgated in succession, which led to the creation of an embryonic form of evidence law in China.⁶ Within a few years, the number of evidence-related articles in academic journals far exceeded what had been published in the past.⁷ Research on evidence law gradually shook off the influence of ideology, and academics undertook deeper research on topics such as relevance, admissibility, evidential rules, principles about the proof of a *probandum*, burden of proof, and evidence lawmaking. Meanwhile, people's interest

⁴ During the era of Planned Economy, the political system in China became a system of people's congresses that is different from Checks and Balances, with separate powers among legislative, executive, and judicial branches. The results is that the legislative and judicial branches cannot independent of the others.

⁵ The Cultural Revolution was a political campaign in China, launched in 1966 by Chinese Communist Party Chairman Mao Zedong during his last decade in power to eliminate his political rivals and revolutionize Chinese society. The Cultural Revolution also caused economic disruption; industrial production dropped by 12% from 1966 to 1968. Not until Mao's death (Sept., 1976) was the movement was brought to a close.

⁶ They are *Regulations promulgated by the Supreme Court of P. R. C. on Evidence for Civil Cases* which have been passed by the Judicial Committee of the Supreme People's Court on December 6, 2001 (promulgated for implementation as of April 1, 2002) and *Regulations promulgated by the Supreme Court of P.R.C on Evidence for Administrative Cases* which have been passed by the Judicial Committee of the Supreme People's Court on June 4, 2001 (promulgated for implementation as of October 1, 2002). One two type of evidence law is for civil cases while the other is for administrative cases. There has not been a type of evidence law specifically for criminal cases yet, but some rules about criminal evidence are included in the Criminal procedure Law. There are many distinctions between the two types of evidence law. For example, in an administrative case, the defendant has the burden of proof to prove its administrative acts are legitimate, whereas in civil cases the burden of proof is borne by the plaintiff. To clarify a point, in administrative cases in China, the defendant must be the government. Otherwise they would be civil cases. This contrasts with cases in the U.S., where the defendant is often a company that an administrative agency is suing for violating the law, as in an environmental pollution case.

⁷ Since the 1990's, a new generation of textbooks and works on evidence law sprang up like bamboo shoots after a spring rain. According to incomplete statistics, there were more than 70 kinds of publications with regard to evidence law in China in the past decade.

began to shift to many problematic issues, such as the theoretical basis of evidence law, the theory of standards of proof, the burden of proof, exclusionary rules for illegally obtained evidence and discovery of evidence.⁸ The law of evidence became part of the curricula of many universities, and some law schools have made it an obligatory module for postgraduates. In 2007, China University of Political Science and Law, for the first time officially classified the law of evidence as a same-level major with procedural law for enrolled postgraduate students. The law of evidence has now become a well-known discipline in China. Professor Baosheng Zhang argues that there are four signs that the law of evidence is now a thematic discipline in China: (1) a large numbers of books and treatises on evidence theory have been published recently; (2) there have been many advances in the disciplinary construction of evidence law in some institutes; (3) two important regulations (civil and administrative evidence) were issued by the Supreme Court of the P. R. C., and some local High Courts also adopted many local rules of evidence;⁹ (4) many discussion drafts of rules about evidence have appeared, written by many scholars who promote the activity of evidence law-making.¹⁰

2.2 *The Contemporary Evidence Theories of China*

2.2.1 *The Standard of Fact-finding: Objective Truth and Legal Truth*

Chinese evidence theory accepts that cognition of facts depends on evidence. Cognition of facts on this view results from the sensations and perceptions of humans. If a thing or its situation is not sensed, even though it has an objective existence, one cannot say that a human agent senses a fact, since the fact does not enter the human being's epistemological fields and is not accepted by the agent.¹¹ Along these lines, ontological facts can be categorized under the heading Fact1, and the epistemological/cognitive facts fall under the heading Fact 2. These categories are different and the aim of evidence theory is said to be to make Fact 2 tally with Fact 1.

The distinction between Fact1 and Fact2 has given rise to two competing theories called Objective Truth and Legal Truth.¹² Disputes between the Objective Truth and the Legal Truth camps are often connected with debates about the standard of proof. The Objective Truth camp argues that the people involved in judicial activities should make their cognitive facts completely

⁸ For example, a book entitled *Zhenjufaxue Yanjiu* (*Study on Evidence Law*), which edited by Professor Jiahong. He inquires into some fundamental theories of evidence law such as epistemology, value theory, methodology, information theory, probability theory, logic, mathematics, behavioral science theory and natural science in a all round way. See Jiahong He, *Zhenjufaxue Yanjiu, Study on Evidence Law*, (China Renmin University Press: Beijing, 2007).

⁹ There are four grades of courts in the Chinese trial system. The highest one is the Supreme Court; the second grade is called the High Court in each province (state), the third grade is called the Middle Court in each city, and the fourth grade is the county court. High Courts here refer to the second grade of court. Courts except the fourth grade court (the lowest) hear appeals of a lower court. But each case has only one chance for appeal. For example, if a Middle Court (the third grade) heard an appeal from a fourth grade court, then the High Court would not hear an appeal about the same case from the Middle Court.

¹⁰ See Baosheng Zhang, Zhenjufa Lifa: Tongyi Haishi Fenli (*Evidence Law-making: Unification or Decentralization*), in *People's Court Daily*, November 20, 2007.

¹¹ Yilian Peng, *Shishilun* (*Theory of facts*), (Shanghai Social Science Publishing House: Shanghai, 1996) 1.

¹² There are different statements with respect to the questions of Objective Truth and Legal Truth in Anglo-American law system. For example, Professor Robert Summers calls Objective Truth Substantive Truth, and regards the fact which the trier of fact finds as formal legal truth. See Robert S. Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases', (1999) 18 *Law & Philosophy* 497-511.

tally with the ontological facts.¹³ In other words, the Objective Truth camp asserts that judges should try to reach objective truth. Because of the uncertainty in fact-finding, however, the Legal Truth camp rejects this thesis; it asserts instead that people only grasp the truth which the law describes or admits, which suggests that there is a kind of truth in the sense of law.¹⁴ The viewpoint of Legal Truth is that fact finding in judicial adjudication is based on the evidence presented, and that by virtue of missing evidence and the cognitive limitations of agents, humans cannot reach the Objective Truth. This theory is consistent with the view that the facts we know are constructs, partly determined by procedures of discovery, which in turn depend on procedures of justification. On this view, the search for truth is something we only undertake through institutional procedures which give us criteria enabling us to describe our activity as truth seeking.¹⁵ These two theories differ with respect to the standard of proof in adjudication because the Objective Truth theory requires a higher standard of proof than the Legal Truth theory.

2.2.2 *The Separation between and Integration of Evidence Scholarship and Evidence Law*

At a macroscopic level, the research on evidence in China can be viewed in terms of the relationship between evidence scholarship and law of evidence. This terminology has shifted. The term “evidence scholarship” previously had a narrow sense which focused on the general description of evidence, such as the nature of evidence, whereas the law of evidence, which had the same meaning as ‘rules of evidence’, only focused on legal control of evidence. In the history of Anglo-American evidence law, there is no definite boundary line between evidence scholarship and evidence law. In the evolving history of Chinese legal scholarship, there was a transition from integration to separation between evidence scholarship and evidence law. Although evidence scholarship and evidence law were differentiated, the research on evidence theory had been stultified in evidence law research for a long time, to such an extent that evidence scholarship had even been regarded as evidence law.¹⁶ Books on evidence, for example, were entitled ‘evidence law’ in this period. More recently, the relationship of evidence scholarship and evidence law has changed. For example, some scholars regard evidence law as a kind of evidence theory existing in the domain of law being stipulated by law. This implies that evidence scholarship has a far broader scope and that it plays a foundational role for evidence law. On this view, evidence scholarship deals with general questions about evidence and proof and applies to any field which uses evidence to prove facts.¹⁷ The aim to establish a foundational evidence scholarship is to apply its basic principles to other special subjects and then form many different branches of evidence scholarship. Because of these recently changing views, and the difference of terminology, it may

¹³ The main representative who holds this viewpoint is Professor Guanzhong Chen, Susongzhong de Geguanzhenshi yu Falvzhenshi (Objectively True and Legally True in Litigation), in *Procuratorial Daily*, July 13, 2000.

¹⁴ The main representative who holds the viewpoint of Legal Truth is Professor Jiahong He, according to his account of the goals and the standards of judicial proof, in *Chinese Journal of Law*. See Jiahong He, ‘On the Goals and the Standards of Judicial Proof’, (2001) 6 *Chinese Journal of Law* 40-54.

¹⁵ See Zenon Bankowski, ‘The Value of Truth’, (1981) 1 *Legal Studies* 262.

¹⁶ In the late-20th century, a number of works entitled Evidence Scholarship talked routinely about topics of evidence law. The distinction between Evidence Scholarship and evidence law is not as different as the waters of the Jinhe and Weihe (entirely different). As a matter of fact, scholars were talking what the same thing—rules on collecting and applying evidence—even though different scholars stress different aspects and made them use different terms.

¹⁷ Zongzhi Long, ‘On the Structure of “General Study of Evidence” and Relative Theories’, (2006) 5 *Chinese Journal of Law* 96.

be hard for outsiders to track what is happening.

2.2.3 *The Draft of Evidence Law* : The Uniform Provisions of Evidence of the People's Court

Among academics, there are three models on how evidence law-making in China might be made to move forward. The first model set forth a special set of requirements to describe the rules of evidence in criminal, civil and administrative procedural law. The second model let the Supreme People's Court of P. R. C. and the Supreme People's Procuratorate of P. R. C. issue judicial interpretations on evidence. The third model integrated the evidence rules within criminal, civil and administrative procedural law, forging them into a unified provision. Most scholars are presently inclined to accept the third option. Some expert draft proposals on Evidence Law made by scholars are: *the Draft of Evidence Law of China (Suggestion)* chaired by Professor Jiang Wei, *the Uniform Evidence Law* chaired by Professor Chen Jierong and *the Suggestion Draft of Evidence Law of China* chaired by Professor Bi Yuqian. In August, 2006, entrusted by the Supreme Court of P. R. C., the Institute of Evidence Law and Forensic Science (IELFS) of China University of Political Science and Law organized a meeting of many famous domestic specialists in evidence law who were responsible for drawing up *The Uniform Provisions of Evidence of the People's Court* (UPEPC), a judicial interpretative suggestion draft. It is based on the present statutes of evidence regulations and its aim is to solve the problems existing in the current evidence system and to meet the needs of judicial practice. This was made possible by thorough discussions and by constant modifications.¹⁸ The UPEPC assimilates the new achievements in evidence research and focuses on its systemic completeness, logical continuity, and consistency with other branches of law and feasibility in implementation in practice. It integrates the evidence statutes embodied in the criminal, civil and administration procedures, and provides a way of tracking the evolving situation of the evidence system in contemporary China. Taking relevance as its logical thread, the draft not only expounds general values of law such as justice and fairness, but also reflects some specific foundational values including, accuracy, harmony and efficiency. The values of justice, fairness, accuracy, and efficiency need little explanation. The value of harmony in evidence law requires clarification in two aspects. On the one hand, it is used to exclude relevant evidence such as subsequent remedial measures, attempts to settle cases, and payment of medical expenses. On the other hand, it expresses values that have the aim of protecting social relationships that promote a stable community.¹⁹ Examples of "harmony" in Chinese law are mainly embodied in the rules of privilege, like attorney-client privilege. However there are not as many exceptions as there are in Anglo-American law.

The goal of UPEPC is to provide the judges with assistance in finding the facts in issue

¹⁸ The Institute of Evidence Law and Forensic Science, China University of Politics and Law, which is comprised of the Institute of Evidence Law and the Institute of Forensic Science, was established on May 20, 2006. It is the largest research organ and the largest team of researchers in evidence science in China at present time. The institute also specially started publication the *Journal of Evidence Science* (the journal gets its name from changing the name of the *Journal of Law & Medicine*) as the platform for academic exchanges in the world of evidence science. Besides this, another professional institute which specializes in evidence scholarship research is the Institute of Evidence Law of Renmin University of China which was established at the same year. The judicial suggestion draft, finished on October 8, 2007, has a panel list which regards Professor Baosheng Zhang, dean of the Institute of Evidence Law and Forensic Science, China University of Politics and Law, as a chief specialist.

¹⁹ See Baosheng Zhang, *The Uniform Provisions of Evidence of the People's Court: Proposal for Judicial Interpretations and Drafting Commentary* (China University of Political Science and Law Press, 2008) 9-10.

during the trials. To achieve this goal, besides constructing the process of proof for fact-finding based on producing, confronting, and authenticating evidence, UPEPC establishes some basic exclusionary rules of evidence. These include rules covering hearsay, character, propensity evidence, and the like. By these means UPEPC improves the evidence discovery system and the system of adducing evidence. The code also covers the system of proof. A set of systemic theories concerning the implications of proof, principles about the *probandum*, of proof,²⁰ burdens of proof, the process of proof and methods of proof, degrees of proof, standard of proof and exclusionary rules have been formed in UPEPC. For example, Chapter III of UPEPC provides for the exclusion of hearsay, character and propensity evidence, and certain evidence when it is offered to show fault and liability. As far as expert evidence is concerned, Article 102 in UPEPC authorizes the parties to entrust a forensic science organization or qualified forensic scientists to conduct forensic identification and examination for specialized issues before filing a lawsuit. Article 103 identifies seven specialized issues that must be certified in criminal cases: (1) inability to recognize or control one's own act due to mental illness; (2) extent of bodily harm; (3) reasons for abnormal death; (4) whether statutory age for bearing criminal liability has been reached; (5) whether a witness is capable of distinguishing right from wrong and of making correct expression; (6) price of a commodity, class of a cultural artifact; and (7) species of rare and precious animal and plant, contraband, hazardous materials.²¹ In short, UPEPC lays a foundation for improving evidence law and further development of evidence theory in China. A test of UPEPC has taken place in seven courts chosen from 3000 courts all over China since May, 2008 and the test was closed on January 23, 2010.

3. Comparisons between the Contemporary Evidence Theories of China and Anglo-American Law of Evidence

As we have seen, the historical origins of Chinese traditional evidence law are found in the continental law tradition, but more recently it has been deeply influenced by the Anglo-American tradition. However, there still are some features in Chinese evidence law that makes it different from Anglo-American evidence law.

3.1 Institutional Design

There are advantages and disadvantages of both adversarial and inquisitorial modes of justice. Moreover, differing views of justice are legitimately influenced by the common practices, values and culture of a country. In models of litigation, China did not, at least typically, follow the models of the Continental legal systems and it absorbed key principles of the Anglo-American model. This process shows the traditional Golden Mean philosophical approach of China.²² The mode of

²⁰ A *probandum* is a proposition that in principle can be shown to be true or false. See Terence J. Anderson, David A. Schum and William L. Twining, *Analysis of Evidence*, 2nd ed. (Cambridge: Cambridge University Press, 2005) 60.

²¹ See Baosheng Zhang, *The Uniform Provisions of Evidence of the People's Court: Proposal for Judicial Interpretations and Drafting Commentary* (China University of Political Science and Law Press, 2008) 72-74.

²² The traditional Golden Mean of China called *Zhong yong*, means "middle" and "moderation", as opposed to extremes of excess and deficiency. See Chan Wing-Tsit (translator), *The Doctrine of the Mean* [Zhong Yong Chung Yung], attrib. to Confucius, published in *A Sourcebook in Chinese Philosophy*, (Princeton, NJ, USA: Princeton University Press. 1963) 95-115.

fact-finding in the current civil trial model of China does not give complete power to the judge. In civil cases, proceedings are partly adversarial; but this is not the case with the criminal justice system. There still exists a strong pursuit of objective truth in criminal cases. One reason for this is that criminal cases concern the defendant's freedom and the right to life. The prevailing view is that it is more important to find the real truth in criminal cases than in civil cases. A reason behind this view lies in the principle that the legal process not only serves to resolve disputes, but also to enforce state policy,²³ and the criminal justice system has a stronger policy-implementing function than the civil system. Evidence law as formulated in Anglo-American frameworks such as in the U.S. Federal Rules of Evidence, are concerned not so much explicitly with whether the truth of a case can be revealed accurately, but with the balancing of the means of proper fact-finding. For example, the balancing of relevance against other competing interests is embodied in Rule 403. Another condition hindering truth-finding in China is not the evidence system itself, but the separation between system and practice, such as the internal system for examination of judicial institutions.²⁴ Some judicial organs, for example, set up certain targets for examining the work of investigators. This resulted in the investigators having to use expedient methods to investigate cases in order to reach the targets. This necessarily hinders the significance of finding the truth about facts. In China, issues of fact are the main grounds for appeals, but Anglo-American evidence law tends to restrict appeals to claims based on evidentiary errors. It is easy to see that the Anglo-American law system emphasizes the principle that *different situations should be treated in different ways* and the constitutional principle of due process focuses more on the pretrial handling of evidence in criminal cases than on the handling of evidence at trial. Compared with it, the evidence law system of China gives much more consideration to the principle that *the same situation is treated in the same ways* in this stage. It assures that many contents of Chinese evidence law are closely related to considerations of the investigation procedure of evidence at all stages, including investigations by police, placing a case on file for prosecution, prosecution and trial,

It is fair to say that in China, truth-finding is regarded as the foremost value to be upheld in litigation. In criminal trials it is taken to be fundamentally important that all criminals should be punished. All pieces of evidence must be used for truth finding as long as they are relevant. In this system, professional judges are supposed to be responsible for the trial, and the effect of People's Assessors is extremely limited.²⁵ What is more, prohibitions against double jeopardy and plea-bargaining are not established yet and police do not play the role of factual witness in Chinese criminal justice system. In contrast with the rights of the defendant, the system lays much more stress on the protection of the victim's rights. For example, the rule is that the prosecutor should listen to victim's opinions when he examines the prosecution's case. The compensation for a victim can be achieved through the bringing of a *civil suit collateral to criminal proceedings*, but not through independent civil suit proceedings. One of the benefits of this arrangement is that it

²³ See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 88.

²⁴ In the Chinese legal system, judicial institutions include police stations (offices of police investigators) that are responsible for factual investigations in criminal cases, procuratorates (referring to the office of prosecutors) that are responsible for charging in criminal cases, and the courts that adjudicate legal disputes and dispense civil, criminal, or administrative justice in accordance with rules of law.

²⁵ The current trial model in China is not the same as typical jury system in common law system, but there is a system of people's assessors. To serve as a people's assessor, one shall have an educational background of, as a general rule, junior college or higher. See Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors, adopted at the Eleventh Session of the Standing Committee of the Tenth National People's Congress on August 28, 2004.

can avoid repeated lawsuits, and then the victim's interest can be protected in due course. In contrast, the Adversarial system can be said to take a balancing of human rights against social interests theory as its philosophical foundation. This view emphasizes that the outcome could be a good or acceptable one if and only if it comes about through a due process in order to promote the entire social public interest through protecting individual rights.

Although the motive for fact-finding in the law of China is not opposed to that of Anglo-American law, the divergence of views on their ultimate goal makes the course of fact-finding different. Anglo-American law postulates more *burdens* than China in the course of fact-finding. On the one hand, the American criminal justice system gives more consideration to the protection of a criminal defendant's rights, and it may be conjectured that this is one of the reasons why misjudged cases have recently emerged one after another in the U. S. Professor Samuel R. Gross of the University of Michigan Law School has counted 340 individual exonerations from 1989 through 2003, not including at least 135 innocent defendants in at least two mass exonerations, and also not including more than 70 defendants convicted in a series of childcare sex abuse prosecutions in his report.²⁶ Another reason he offered for wrongful convictions is that the defense has a more limited ability to conduct pretrial investigations. But there may be other explanations. While lawyers are often driven by the idea of winning litigation, police and prosecutors may be motivated to fabricate evidence in order to win against the defense lawyers. The requirement that the truth be pursued tends to take the back seat under such conditions, and this could lead to the innocent being adjudged guilty. On the other hand, it is very possible that this vast protection of defendants' rights has the effect of letting loose guilty culprits on a wide scale. From a viewpoint of the way criminal cases are handled in China, the reasons that appear to result in such a large number of exonerations lie in two aspects. On the one hand, the American criminal justice system gives more consideration to the protection of a criminal defendant's rights and this results in prosecutors missing much evidence that might be used to prove the guilt of defendant. On the other hand, the defense has a more limited ability to conduct pretrial investigations and this increase the probability of convicting of innocent defendants. At present in China, the defendant holds no such rights that are comparable to those in Anglo-American countries, and the investigation of police is confined to the search for "objective justice". The aim of the prosecutor in filing a lawsuit is not merely to win the litigation, but more importantly, to realize judicial justice eventually. Judging from this viewpoint, the prosecutor shares the same responsibility as the judge does. The result is that the police of China have a dominant right to investigate evidence. But because this may give the police too much power, a recent reform has shifted the attorney's intervening to an earlier time as defence lawyers are allowed to intervene when the interrogation begins, according to *the Law of the People's Republic of China on Lawyers* revised in October 2007.²⁷

²⁶ See Samuel R. Gross *et al*, 'Exonerations in the United States, 1989 through 2003', (2005) 95 *Journal of Criminal Law and Criminology* 2. There is no similar specific report to show such a finding in China; however, according to the statistic from the Supreme Court of People's Republic of China, more than 40,000 people were judged "not guilty" from 1996 to 2006. It can be noted that 40,000 "not guilty" verdicts in a country the size of China in ten years does not sound like a large number.

²⁷ Article 33 in the *Law of the People's Republic of China on Lawyers* reads that "As of the date of first interrogation of or adoption of a compulsory measure on a criminal suspect by the criminal investigative organ, an authorized lawyer shall have the right to meet the criminal suspect or defendant and learn information related to the case, by presenting his lawyer's practicing certificate, certificate of his law firm and power of attorney or official legal aid papers."

3.2 Classification of Evidence

Anglo-American evidence law tends not to classify evidence into different types. In contrast, the procedural law of China prescribes that all facts proving the true circumstances of the case are evidence, and the three major procedural laws classify evidence into seven kinds: material evidence, documentary evidence, testimony of witnesses, statements of parties (including statements of victims, statements and exculpations of criminal suspects or defendants), audio-visual material, expert evaluation and records of inquests and examination.²⁸ Each kind of evidence has even been strictly defined, which lays a foundation for setting up corresponding rules for different types of evidence.

3.3 Rights of Collecting Evidence by Court : Entrust vs. Forbid

The question of whether a court can consider evidence beyond that which is gathered or presneted by the parties poses a considerable difference between the two litigation modes of the adversarial and inquisitorial systems. In the Anglo-American criminal justice system, generally neither the jury nor the judge has any right to collect or consider evidence that has not been gathered and presented by the parties. In the mode of the Chinese inquisitorial trial system, the judge is the dominant figure in the trial, and both the prosecutor and defense counsel play only auxiliary roles. Therefore, the law prescribes that when a party cannot collect evidence for objective reasons, but can provide clues, he or she may apply to the court for the court's collection of evidence.²⁹ Courts may sometimes collect evidence *ex officio* without parties' application.³⁰ To some extent, the aim of the court collecting evidence is to remedy the deficiency of the competency of parties in collecting evidence, and help fact-finders to make factual determination accurately. The situation is completely different from countries of Anglo-American law, because the fact-finders in Anglo-American countries do not have the same mission as judges do in China, where the jury or judges do need to explain their factual determinations. What should be paid attention to is that the collecting evidence activity of courts based on the application of parties, in contrast with the situation of parties collecting evidence by themselves, makes the parties passive in some respects.

²⁸ *The Uniform Provisions of Evidence of the People's Court: Proposal for Judicial Interpretations and Drafting Commentary* classifies the types of evidence as parties' statement; testimony by witness; authentication conclusion and expert opinion; real evidence; documentary evidence; site inspection, check and record; audio-video and electronic evidence, and added to demonstrative evidence that in the form of module, graphic and table, drawing, photograph or electronic image may be used to make duplicates or depictions of human beings, objects or scenes that are related to facts of a case.

²⁹ For example, Article 17 in *Regulations promulgated by the Supreme Court of P.R.C. on Evidence for Civil Cases* prescribes that in any of the following circumstances, the parties concerned or their agents *ad litum* thereof may plead the court to investigate upon and collect evidences: (1) The evidences applied for investigation and collection are the archive files kept by relevant organs of the state and must be accessed by the court upon authority; (2) The materials that concern state secrets, commercial secrets or personal privacy; (3) Other materials that cannot be collected by the parties concerned or the agents *ad litum* thereof due to objective reasons.

³⁰ For example, according to Article 64 of the *Regulations promulgated by the Supreme Court of P. R. C. on Evidence for Civil Cases*, the court may collect evidence *ex officio* when the following circumstances exist: (i) facts that may damage national interests, public interests or others' legitimate rights and interests; (ii) facts that involve the identity relationship; like the identity of a person or family or social relationships; and (iii) procedural facts that have no bearing on substantive disputes, such as adding parties, suspend litigation, terminate litigation, or challenge *ex officio*.

In this regard it is recognized that parties need help.³¹

On the other hand, the procedure of the courts of China investigating evidence is not only diametrically different from Anglo-American law countries, but also has much in common with countries of the continental law system. According to the criminal procedure law of China, for example, during the course of a trial, if jurors cast doubt on some form of evidence, the court can order a recess and investigate the doubts about the evidence. When carrying out such an investigation to verify evidence, the courts may conduct inquests, examinations, seizures, expert evaluations, inquiries and perpetuation.³² According to scientific principle, the court is also required to consider the effect of the investigation[?] on the defendant when investigating evidence, and should abide by the following four principles: (1) the court should inform both of the parties of the matter under investigation; (2) the court should invite both parties to take part as much as possible during the course of investigation; (3) the court should release the result to both parties; and (4) the evidence obtained through investigation should be confronted in court, and the court should offer the defendant the right to express his opinion about the evidence. Moreover, in the eyes of Anglo-American evidence law scholars, what is inconceivable but what is in fact true is that the investigating court is not limited by the scope of the indictment. However, this lack of limitation is not boundless, but has a demarcation line of avoiding causing any unfairness to either party. The way courts in China collect evidence actually resolves some difficulties that the parties encounter in the course of collecting evidence, but a court's investigation may create another problem: It may lead to the result that the testimony of a witness is collected over and over again, and the trial deadline is prolonged. This can be disadvantageous to the defendant. One of the reasons is that the means the court has for investigating and confirming evidence are not applied to testimonies of victims or witnesses, and the law does not set a limit to the frequency of parties' application. Hence the judge can only come into contact with the testimony in the court, not out-of-court.

3.4 Modes of Appraising Evidence: Free-evaluation-dominated vs. Rules-dominated

Free evaluation of evidence through 'inner conviction' is a method of appraising evidence in the Continental law system. This principle accords with natural human reasoning. Free evaluation of evidence through inner conviction is sometimes a best choice in a human agent's power in the course of fact-finding. Mr. Jiaben Shen, the Commissioner of the Legal Reform Commission of the Qing Dynasty, was responsible for revising law and imported the principle of free evaluation of evidence through inner conviction. However, after the People's Republic of China was founded, in virtue of being affected by political ideology, lots of scholars criticized free evaluation of evidence through inner conviction because they thought it had been inconsistent with the political system of democratic centralism. Not until the end of the last century could this principle be

³¹ An amendment with respect to *The Law on Lawyers of the P. R. C.* which passed on October 28, 2007, entrusts lawyer the right of investigating evidence, but does not weaken the status of the judge investigating evidence, and only gives a balance on the right of investigating evidence between the prosecutor and the defender.

³² Criminal Procedure Law of the People's Republic of China 1996, a.158.

adopted once again.³³ To some extent the method of appraising evidence in the Chinese evidence system can be regarded as a free-evaluation-dominated mode, which takes free evaluation of evidence through inner conviction as a leading principle and views rules as auxiliary. However, the rules of evidence (especially the exclusionary rules) in the Anglo-American law system emphasize the admission of evidence in the course of the trial, although they more or less leave the fact-finder free to evaluate the evidence or follow any instructions that the judge may give. One of the main consequences for Anglo-American law is that a considerable number of evidence rules are concerned with the competence or admissibility of evidence. On this basis, much of the trial typically focuses on arguments about the admissibility of evidence, while the fact-finder is left free to evaluate the evidence that is admitted. From this viewpoint, the mode for appraising evidence in Anglo-American evidence law appears to be rules-dominated. Moreover, most rules of evidence in the Anglo-American system are not self-executing and decisions by the parties generally determine if a rule of evidence will be applied. It is usual to see in Anglo-American judicial practice instances where both the plaintiff and defendant do not obey them of their own accord. When one side violates some rule of evidence, so long as the other side does not put forward an objection, the judge will not take vigorous action to stop his or her arguments. Although the evidence rules in China are not as dominant as they are in Anglo-American countries, the collection of evidence is still emphasized. The law requires judicial organizations to comply with the rules on the one hand, and asks both parties to abide by them on the other hand. On the current Chinese view, if one of the parties violates any rules, even if the other side does not object, the judge should stop him or her as duty requires. Otherwise, the judge neglects his duty. The Judges Law of the People's Republic of China stipulates the duty of a judge is to take part in a trial as a member of a collegial panel or to try a case alone according to law.³⁴ To repeat, the trial is regarded as a process of finding the truth and making judicial decisions based on the law. Generally speaking, the main duty of the judge is to find judicial justice.

4. The Modernization of Evidence Theory: Towards a Comprehensive Evidence Scholarship

Through having analyzed the evidence system of China and having compared it with the Anglo-American evidence system, we conclude that, affected by the common method of discovering truth and the mixture of different cultures, the evidence system of China which takes the Continental Law system as a model is evolving towards the Anglo-American evidence system. For instance, there are almost no exclusionary proscriptions against hearsay and character evidence; at this point in the Chinese evidence system. When the judge encounters a witness in court reporting another's statement of out-of-court, he usually calls the author of the text to the stand; by this means hearsay evidence is transformed into witness testimony. Even if the hearsay declarant is unavailable to testify as a witness in court, the judge would not remove the hearsay

³³ Article 64 of Regulations promulgated by the Supreme Court of P.R.C on Evidence for Civil Cases prescribes that the judges shall verify the evidence according to the legal procedures in an all-rounded and objective manner, shall observe the provisions of law, follow the professional ethics of judges, use logical reasoning and daily life experience to make independent judgments concerning the validity and forcefulness of the evidences, and publicize the reasons and result of judgment.

³⁴ See Article 5, *the Judges Law of the People's Republic of China*. Adopted at the 12th meeting of the Standing Committee of the Eighth National People's Congress, and amended according to the Decision on Amending the Judges Law of the People's Republic of China adopted at the 22nd meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on June 30, 2001.

evidence absolutely, but confirm its probative value according to the situations of corroboration with other evidence in the case. There also appear to be some changes in Anglo-American evidence law in ~~on~~ the attitude to hearsay evidence. The increasing number of exceptions to the hearsay rule is a sign~~s~~ of this trend. In effect, the application of science and technology in courts is undermining the use of the objection of hearsay. These trends are very likely to further reduce the distinctions between the two evidence systems. This tendency is easily visible in the course of the modernization of evidence theory we are writing about.

4.1 *From Pluralistic Evidence Law to Comprehensive Evidence Scholarship*

In the 21st century, the emphasis of evidential research in China, on the one hand, began to shift from a static description of evidence to a dynamic analysis of the process of proof. On the other hand, the study of evidence theory has experienced parallel shifts—from emphasizing the elements of evidence to examining pluralistic evidence theories, from focusing on ontology to epistemology, from unified evidence scholarship to pluralistic evidence law. Now is an appropriate time for another shift from pluralistic evidence law to a comprehensive evidence scholarship. The conceptual separation between evidence scholarship and evidence law has not been maintained for a long time. This has resulted in the emergence of an evidence science that can synthesize both subjects. For example, Professor Zongzhi Long, of Southwestern University of Politics and Law, called this field “General Study of Evidence”.³⁵ In June 2006, scholars from China University of Political Science and Law put forward the definition of “evidence science” in the *Petition for Key Laboratory in Evidence Science of the Ministry of Education of China* as “a system of scientific theories and methods, which can synthesize natural science and social methods, and study collection of evidence, technology of authentication, and the general law of fact-finding and legal application.” It can reasonably be inferred from this definition that “evidence science” is comprehensive in nature, and takes law of evidence and forensic science as two principal areas covering three branches: forensic medicine, criminalistics and evidence law. It shows how the comprehensive research areas are extending into many disciplines such as medical science, engineering, natural science, philosophy and psychology, and how they synthesize teaching, research and judicial practice.³⁶ Compared with evidence theory research in Britain³⁷, the multidisciplinary researches on the fundamental theories of evidence in China is weaker. The effort to advance the concept of evidence science in China is aiming at solving this problem and strengthening the researches on fundamental theories of evidence. The effort to advance the concept of evidence science in China seeks to address this problem and thus strengthen research about fundamental theories of evidence

³⁵ Above n. 17, at 98.

³⁶ See <http://gate.cupl.edu.cn/zjkxyjs>. However, one problem comes up: China is now facing an extremely fast advance of evidence theory, and the lack of necessary support systems may hinder it from keeping up with the changing situation. And it is hard to push forward the amendment of criminal procedure law now in virtue of the rights-driving between judicial organs and the reform of judicial system limited by constitution. These developments are very likely to bring about negative influences on the modernization of evidence theory of China.

³⁷ The research on evidence theory of Britain is almost in progress at the same time with its fundamental theories. For example, as early as in the mid-20th century, the evidence theory of Britain had accepted a significant input from philosophy.

We now turn to consider recent developments on evidence scholarship in the Anglo-American system. The new trend of evidence scholarship in Anglo-American system has concerned itself with innovative scholarship on evidence, including the law of evidence, inferential reasoning (the logic of proof), probabilities, the role of statistics and narratives in arguing about deciding contested issue of fact in legal contexts, and the practical and theoretical implications of developments in forensic science, forensic psychology, and artificial intelligence.³⁸ Jackson has observed that evidence scholarship has ranged far beyond legal doctrine. It has been much concerned with theory, particularly with theoretical models, and it has been informed by a very wide range of disciplines, from social psychology, forensic philosophy, mathematics, linguistics, to economics. With such a rich display of disciplinary approaches now benefitting the development of evidence law and the process of legal proof, it might seem that all is rosy in the evidence scholarship garden.³⁹ According to Peter Tillers, the new evidence scholarship shares the following characteristic features: more of a focus on logic and less on law, more of a focus on proof and less on rules of admissibility, more of an emphasis on logical rigor than on rhetoric, and an employment of technical analysis, especially as derived from formal logic, computer science and mathematics.⁴⁰ In his eyes, David Schum's book *Evidence and Inference* is a leading example of the style of theories characteristic of the new evidence scholarship.⁴¹ Another characteristic of this approach cited by Tillers is an emphasis on the multistage nature of evidential inference in which a single inference is made up of several statements linked together by generalizations, and the structure of evidence is viewed as a chaining together of a set of such single inferences. Tillers calls such models network and generalization (NAG) models of evidential inference.⁴² As far as whether it can be called a science of evidence is concerned, Schum gave an answer from another angle in his book *The Evidential Foundations of Probabilistic Reasoning*.⁴³ In the project *Thought about a Science of Evidence*, Schum elucidated conceptions of "science" and of "evidence" respectively and argued that they are now fixed forever. Then he put forward an *Integrated Science of Evidence* which involves law, philosophy, logic, probability, semiotics, history, psychology, and artificial intelligence.⁴⁴ In his recent article, Schum presents an argument that

³⁸ Park and Saks think that the New Evidence Scholarship is a mature field of scholarship—so much so that the label "new" may now be a misnomer. See Roger C. Park & Michael J. Saks, 'Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn' (2006) 47 *B. C. L. Rev.* 984.

³⁹ See John D. Jackson, 'Modern Trends in Evidence Scholarship: Is All Rosy in the Garden?' (2003) 21 *Quinnipiac Law Review* 894-895.

⁴⁰ Peter Tillers, 'Webs of Things in the Mind: A New Science of Evidence', (1989) 87 *Michigan Law Review* 1227.

⁴¹ Ibid; David Schum, *Evidence and Inference for the Intelligence Analyst* (Lanham, Maryland: University Press Of America, 1987). A recent conference on the new evidence scholarship entitled 'graphic and visual representations of evidence and inference in legal settings' had been taken place at Cardozo School of Law in New York City, 28–29 January 2007. Collections from the conference were published on *Law, Probability and Risk* (2007). See (2007) 6 (1-4) *Law, Probability and Risk* 1-326.

⁴² Peter Tillers, 'Are There Universal Principles or Forms of Evidential Inference? Of Inference Networks and Onto-Epistemology', Working Paper No. 215, (2008) 1. <http://ssrn.com/abstract=1079235>.

⁴³ D. Schum, *The Evidential Foundations of Probabilistic Reasoning* (Northwestern University Press, 2001) 6-7.

⁴⁴ See D. Schum, *Thought about a Science of Evidence* (UCL, 2005). According to the definition given by the *Oxford English Dictionary* for "science," the "science" of evidence which Schum defines is meant to represent general usage, not a stipulative definition of a strict kind. The idea of an integrated theory of evidence can be traced back to Gilbert and Bentham. Gilbert, in his posthumously published book *the Law of Evidence*, set out to establish a tightly integrated theory of evidence on the foundation of Lockean theory of knowledge. And Bentham's theory of evidence also purports to integrate at least the logic, psychology and philosophy of evidence. See Gilbert, Sir Jeffrey, *the Law of Evidence*, 3rd ed (London, 1754); Jeremy Bentham, *Rationale of Judicial*

studies of evidence in the fields of law and probability constitute a science of evidence when they are examined in light of five criteria for scientific activity.⁴⁵ He gives three examples of studies from law and probability to justify this argument. Examples from law include a method for classifying recurrent forms and combinations of evidence regardless of their substance or content, studies identifying credibility attributes for different forms of evidence, and studies of complex argument construction in which new lines of inquiry and evidence are generated or discovered. Examples from probability include various views among probabilists about what the weight or force of evidence means and how it should be assessed, including several examples of how important subtleties or complexities in evidential reasoning can be captured for study and analysis. He also offers an example of how alternative theories about the meaning of complex combinations of events can be tested empirically.⁴⁶ As he argues, whether the subject of evidence is in fact a ‘science’ can be debated depending on one’s views of what a ‘science’ actually is. We do not oppose the use of the word “science” for the subject of evidence.⁴⁷ In our opinion, no matter what we name it, the modern theory of evidence is being characterized as multidisciplinary and comprehensive.

Tillers has outlined three approaches as the leading models for postulating logic as the science of proof should be applied to legal evidence.⁴⁸ The first is the statistical approach. Statistical models of legal evidence advocate the Bayesian rules for calculating prior and conditional probabilities to estimate the numerical value of evidence in a given case.⁴⁹ The second is the story-based approach, initially advanced by psychologists. This approach constructs and compares stories about what might have happened, comparing for consistency within a story, and consistency of the story with the facts, to judge whether one story is more or less plausible than another. The story that is better supported by factual reasons that back it up and by applicable generalizations is said to be “anchored”. The story-based approach has currently been taken up as a research topic in artificial intelligence and law.⁵⁰ The third approach is that of argumentation, which uses visualization tools like the Wigmore charting method to analyze, summarize, organize and display the evidence in a case. On the argumentation model, the evidence for one side of a disputed case is weighed against the evidence on the other side by constructing and comparing the

Evidence, Hunt & Clarke (London, 1827).

⁴⁵ The five criteria for scientific activity are : (1) Knowledge obtained by study; acquaintance with or mastery of a department of learning; (2) A particular branch of knowledge or study; a recognized department of learning; (3) A branch of study that deals either with a connected body of demonstrated truths or with observed facts systematically classified and more or less comprehended by general laws, and which includes reliable methods for the discovery of new truths in its own domain; (4) The kind of organized knowledge or intellectual activity of which various branches of learning are examples; and (5) The intellectual and practical activity encompassing those branches of study that apply objective scientific method to the phenomena of the physical universe (the natural sciences), and the knowledge so gained. See David A. Schum, ‘A science of evidence: contributions from law and probability’, (2009) 8 *Law, Probability and Risk* 205.

⁴⁶ Ibid, at 197-231.

⁴⁷ There were several reasons for discontent about the use of the term ‘science’. For example, some persons, whose work directly involves consideration of the properties, uses and discovery of evidence, said that they did not wish to identify their work with something called ‘evidence science’. Schum’s counterargument was that these same persons were almost certainly using a PC or a MAC every day in their work without any worry that someone would identify their work with computer science. He further claims that a science of evidence excludes no one interested in honest inquiry, a respect for evidence and a search for truth. Ibid, at 199-200, 204.

⁴⁸ Peter Tillers, ‘General Introduction’, in Hendrik Kaptein, Henry Prakken and Bart Verheij, eds, *Legal Evidence and Proof: Statistics, Stories, Logic* (Farnham, England, Ashgate, 2009) 5-8.

⁴⁹ See Colin Aitken and Franco Taroni, *Statistics and the Evaluation of Evidence for Forensic Scientists*, 2nd ed. (John Wiley & Sons, Ltd, 2004) Ch 3.

⁵⁰ Floris Bex, *Evidence for a Good Story: A Hybrid Theory of Arguments, Stories and Criminal Evidence*, PhD Thesis, University of Groningen, 2009.

arguments and counter-arguments on each side. Although the Bayesian approach has been dominant in the past, and still remains so, there are some objections to it that have been raised. One objection is that the required numbers are not usually available, or cannot be assigned in a non-arbitrary way. Another objection is that the assignment of such numbers in an arbitrary way leads to errors when the statistical rules are applied to the facts of the case.⁵¹ For these reasons, the story-based approach and the argumentation approach have been attracting recent interest in studies on artificial intelligence and law...⁵²

As Tillers notes, although the three approaches differ in significant respects, they share of the feature of using defeasible reasoning.⁵³ In probabilistic reasoning, new evidence may reduce the posterior probability of the hypothesis. In the story-based approach, new evidence can reduce the plausibility of a story, or even make the story appear to be highly implausible. The argumentation approach is a procedural one in which arguments are thought to be open to critical questioning and skeptical doubts, as well as counter-arguments, as the sequence of argumentation proceeds. Defeasibility in legal reasoning about evidence and proof is important for several reasons. One of them is that legal evidence has to do with historically unique facts. Another is that there are typically hypotheses, or explanatory stories on both sides (as stressed by the story-based approach), that need to be critically examined to see which one is less open to inconsistencies and other logical defects. For example, there are grounds for critically questioning witness testimony that often need to be taken into account in assessing evidence. Many of the other common types of legal evidence, for example reasoning to causation, evaluating expert opinion testimony, abductive reasoning to a best explanation of the facts of a case, reasoning from analogy, and so forth, all need to be evaluated as defeasible reasoning.

Over the past few years there has been strong concentration on evidential reasoning in the artificial intelligence and law community, shifting the emphasis from models of deductive and inductive (probabilistic) models of reasoning to argumentation models. Argumentation is turning out to be a good fit for evaluating defeasible reasoning of the kind used in managing and assessing legal evidence. On the argumentation model, there are always two sides to proving something at issue, the pro and contra sides. The evidence on each side is analyzed as a chain of reasoning made up of premises and conclusions, and the probative weight of the whole connected structure of evidence is judged by how well each supports its case and stands up to criticism from the opposed side. The new models of proof and evidence put forward in computational studies on argumentation are providing ways of bringing evidence scholarship together towards bringing conformity with current scientific findings and standards into judicial proof.

On the argumentation model, defeasible arguments of the kind so commonly used in evidence law are analyzed and evaluated using defeasible argumentation schemes. To say they are defeasible means that they are open to doubts and questions expressed by a second party to whom

⁵¹ Ton Derksen and Monica Meijsing, *The Fabrication of Facts: The Lure of the Incredible Coincidence*, in Hendrik Kaptein, Henry Prakken and Bart Verheij, eds, *Legal Evidence and Proof: Statistics, Stories, Logic* (Farnham, England, Ashgate, 2009) 39-70.

⁵² Floris Bex, *Evidence for a Good Story: A Hybrid Theory of Arguments, Stories and Criminal Evidence*, PhD Thesis, University of Groningen (2009) 81-98.

⁵³ Above n. 48, at 3. The term 'defeasible' comes from medieval English contract law, referring to a contract that has a clause in it that could defeat the contract. However, the origin of the term in recent analytical studies in philosophy and law is the paper 'The Ascription of Responsibility and Rights' of H. L. A. Hart. See Hart, H. L. A. (1949; 1951). *The Ascription of Responsibility and Rights*. *Proceedings of the Aristotelian Society*, 49, 1949, 171-194. Reprinted in *Logic and Language*, ed. A. Flew, Oxford, Blackwell, 1951, 145-166. Hart's notion was that a claim could be tentatively acceptable because it is supported by evidence, but later found unacceptable because circumstances show that the case is an exception to the general rule supporting the claim.

the argument was put forward to support the claim at issue. Each scheme has a set of matching critical questions that represent standard ways of critically probing into the argument to find its potential weak spots. A burden of proof shifts back and forth as critical questions are asked and answered.

The twin problems of central importance for utilizing argumentation schemes in law are those of finding schemes for common kinds of evidence especially – witness testimony evidence and expert opinion evidence. In some ways the latter task is more manageable, because the use of expert opinion evidence in the courts typically takes the form of scientific evidence, and the inferential structure of scientific evidence is somewhat clearer than that of witness testimony of kinds not involving a scientific expert as the source. Schum has built criteria for assessing the competence and credibility of testimony in law, based on ways courts have found, over the centuries, of assessing such testimony by drawing inferences from it and critically questioning it.⁵⁴

Schemes are increasingly being recognized in computational domains such as multi-agent systems as forms of reasoned argument. This trend holds potential for making significant improvements in the reasoning capabilities of artificial agents to be used as argument assistants for lawyers.⁵⁵

Schemes for defeasible legal argumentation are being widely applied to examples of legal reasoning about evidence in studies on artificial intelligence and law. In such cases, the management of expert opinion evidence is fundamentally important. In the literature on schemes, one is typically used as the classical example, namely argument from expert opinion, a form of argument has also been of central and intense concern in Anglo-American evidence law in the past three decades. The scheme argument from expert opinion is presented below.⁵⁶

Major Premise:	Source <i>E</i> is an expert in subject domain <i>S</i> containing proposition <i>A</i> .
Minor Premise:	<i>E</i> asserts that proposition <i>A</i> is true (false).
Conclusion:	<i>A</i> is true (false).

The following critical questions match the argument from expert opinion

CQ ₁ :	<i>Expertise Question</i> . How credible is <i>E</i> as an expert source?
CQ ₂ :	<i>Field Question</i> . Is <i>E</i> an expert in the field proper for <i>A</i> ?
CQ ₃ :	<i>Opinion Question</i> . What did <i>E</i> assert that implies <i>A</i> ?
CQ ₄ :	<i>Trustworthiness Question</i> . Is <i>E</i> personally reliable as a source?
CQ ₅ :	<i>Consistency Question</i> . Is <i>A</i> consistent with what other experts assert?
CQ ₆ :	<i>Backup Evidence Question</i> . Is <i>E</i> 's assertion based on evidence?

When an argument is put forward that fits this scheme, it represents a kind of evidence that has been used to support the conclusion, and this the conclusion is defeasibly supported by the premises. However, because the argument is defeasible, it is open to critical questioning, and if any one of a set of critical questions is asked, the burden of proof shifts back to the proponent of the argument to answer the question. Failure to respond means that the argument in question is suspended, and cast into doubt.

Another scheme that is vitally important to consider in reasoning about evidence in law is the

⁵⁴ Above n. 43, at 108.

⁵⁵ Verheij, B., *Virtual Arguments: On the Design of Argument Assistants for Lawyers and Other Arguers* (The Hague: Asser Press 2005) 55-58.

⁵⁶ Walton, D., Reed C. and Macagno, F., *Argumentation Schemes* (Cambridge: Cambridge University Press, 2008) 310.

one for argument from testimony.⁵⁷

Position to Know Premise:	Witness <i>W</i> is in position to know whether <i>A</i> is true or not.
Truth Telling Premise:	Witness <i>W</i> is telling the truth (as <i>W</i> knows it).
Statement Premise:	Witness <i>W</i> states that <i>A</i> is true (false).
Conclusion:	<i>A</i> may be plausibly taken to be true (false).

The following critical questions match the argument from witness testimony.

- CQ₁: Is what the witness said internally consistent?
- CQ₂: Is what the witness said consistent with the known facts of the case (based on evidence apart from what the witness testified to)?
- CQ₃: Is what the witness said consistent with what other witnesses have (independently) testified to?
- CQ₄: Is there some kind of bias that can be attributed to the account given by the witness?
- CQ₅: How plausible is the statement *A* asserted by the witness?

The critical questions represent types of rebuttals that can be directed against a defeasible argument, and hence they are very important for analyzing and evaluating defeasible argumentation generally. Schum treats the factors of previous convictions related to dishonesty, other misconduct related to dishonesty, character evidence regarding honesty, and testimonial bias, under the heading of veracity.⁵⁸ He treats objectivity as a separate factor in assessing witness credibility. Under the general category of credibility are included the three factors of veracity, objectivity, and observational sensitivity. This approach is consistent with the wealth of experience regarding witness testimony accumulated in the common law legal system since the year 1352.⁵⁹

4.2. *The Ad Hoc Natures of the Comprehensive Evidence Scholarship*

4.2.1 *Pluralistic Fundamental Theories of Comprehensive Evidence Scholarship*

Evidence is usually defined as a statement or fact that supports another statement or fact. When people talk about the evidence in a case, they normally refer to the primary sources of evidence called evidential data.⁶⁰ For example if we hear testimony of a witness who says he saw someone who looked like the suspect jump into a red car, that is evidential data that supports the proposition ‘There is testimony by a witness who saw someone who looks like the suspect jump into a red car’.⁶¹ In addition to this evidential data, the term ‘evidence’ can also refer to conclusions drawn by inference from it. So, for example, the evidential datum above can be used to support the inference that the suspect jumped into a red car. The term has specialized meanings when used with respect to specific fields, such as logic, scientific research, criminal investigation, and legal discourse. In logic, evidence can include propositions which are presumed to be true, used in support of other propositions that are presumed to be falsifiable. In this sense, “evidence” for a

⁵⁷ Ibid.

⁵⁸ Above n. 43, at 107.

⁵⁹ Ibid, at 106.

⁶⁰ Above n. 20, at 382.

⁶¹ Above n. 52, at 13.

proposition is anything that increases the estimate of the probability of the truthfulness of the proposition. This definition means that what is evidence depends on the agent that estimates the probability. To physicians, evidence may be any objective or subjective symptoms observed by the patient, such as blood chemistry or depression, and physical signs observed by a doctor such as an enlarged liver, or even other information about the patient's past history such as smoking or drinking habits or lifestyle. In scientific research, evidence is usually considered to be data that supports or rejects a hypothesis from observation, survey, experiment or previous research. Evidence in science hews to the ideal of experimental method accumulated through observations of phenomena that occur in the natural world, or that are created as experiments in a laboratory.⁶² The evidential theories and methods separated from these fields form the fundamental theories of the comprehensive evidence scholarship that refer to those fundamental and guiding theoretical premises which can resolve its value for existence and developmental direction, reveal the basic issues of evidence science, and make its systemic theories rely on it for existence and development, including epistemology, logic, philosophical value, theory of efficiency, theory of information and other theories of natural science, and so on.⁶³ The theoretical fundamentals of comprehensive evidence scholarship imply an important feature: it is interdisciplinary or multi-disciplinary in nature. Many evidence scholars have elaborated on the interdisciplinary nature of the subject of evidence. For example, Professors Roger Park and Michael Saks divide this interdisciplinary subject into five parts: (i) Psychology and evidence; (ii) Forensic science; (iii) the New Evidence Scholarship; (iv) Feminism and evidence; and (v) Economics and evidence.⁶⁴

A sixth part (vi) should be added however, Evidence in Artificial Intelligence and Law. Research in this area is not only developing new technology to aid in the process of analysis and evaluation of evidence, but is developing more precise structures for reasoning generally, leading the way toward realizing Wigmore's dream of having a science of proof built on logic that can be applied to reasoning about evidence. Artificial intelligence and argumentation studies have recently developed new tools for argument visualization that are useful for analyzing the structure of different kinds reasoning about evidence in law. Three such systems, Araucaria⁶⁵, Carneades⁶⁶ and Rationale⁶⁷ can be used to visually represent reasoning based on evidence. In Araucaria a

⁶² It is necessary to note the difference between *evidence in science* and *scientific evidence*. Evidence in science is the accumulation of data through evaluation and research that carefully examines how an intervention is delivered and what improvements result. It is repeated with the same result in multiple sites with different researchers and different experimental and control groups. According to Achinstein, there are at least four concepts of evidence in use in the sciences: epistemic situation evidence, subjective evidence, veridical evidence and potential evidence. See Peter Achinstein, *The Book of Evidence*, (Oxford University Press: New York, 2001) 13-30. On the other hand, scientific evidence is fact or opinion evidence that purports to draw conclusions based on specialized knowledge of a science or to rely on scientific principles for its evidentiary value. It is usually presented in court by specialists like a serologist, pathologist or chemist testifying as an expert, if in some situations the use of scientific techniques may provide to additional evidence necessary to prove or disprove the facts in issue. Scientific evidence is one of the kinds of evidence in the law.

⁶³ Professor Twining suggests that evidence as a multi-disciplinary subject is about inferential reasoning. The common ground consists of some general philosophical issues about logic, probability, truth, and knowledge. See William Twining, 'Evidence as a Multi-Disciplinary Subject' in William Twining, *Rethinking Evidence: Exploratory Essays* (Cambridge University Press, 2006) 440.

⁶⁴ Above n.38, at 950. The "New Evidence Scholarship" here is in Richard O. Lempert's sense. See Richard O. Lempert, 'The New Evidence Scholarship: Analyzing the Process of Proof' (1986) 66 *Boston University Law Review* 439.

⁶⁵ <http://araucaria.computing.dundee.ac.uk/>

⁶⁶ <http://carneades.berlios.de/downloads/>

⁶⁷ <http://rationale.austhink.com/>

premise is diagrammed as a statement in a box, and the user can insert an arrow representing an inference from the premise (or from a set of premises) to a conclusion. If the inference fits an argumentation scheme, that can be marked on the diagram as well. Carneades is a tool especially designed for legal argumentation. In Carneades a premise is a relation between a statement and an argument, shown as a node in the diagram. An example is given in figure 1 below. There is a key difference between the two diagramming systems. In Araucaria, each statement can be used as a premise in only one argument. In Carneades, a statement can be used as a premise in any number of arguments.

Prakken presented a simple example suggesting how common arguments used in law are based on visual evidence: this object looks like an affidavit, therefore it is an affidavit.⁶⁸ This type of argument has been represented as an argumentation scheme called argument from appearance:⁶⁹

Major premise: If a visible object appears to be an x then the object is an x.
 Minor premise: This visible object appears to be an x.
 Conclusion: This visible object is an x.

This scheme is open to critical questioning. The critical questions for the scheme for argument from appearance are given below.

CQ₁: Could its appearing to be an x be misleading for some reason?
 CQ₂: Although it appears to be an x, could there be grounds for thinking it is a y?

This defeasible argument is best seen as providing only plausible reasoning, as opposed to deductive or inductive grounds of support of its conclusion. It is best evaluated on a balance of considerations using critical questions.

Let us consider another example of evidence based on this scheme. During a report of a convenience store robbery (*Radio News*, November 9, 2004), the convenience store clerk stated: “The handle of what appeared to be a handgun was visible in his [the robber’s] pocket”. By argument from appearance, shown in the node, if the item visible in the pocket appeared to be the handle of a handgun, then the tentative conclusion can be drawn that it is the handle of a handgun. One reason for invoking such a presumption is safety. It may prudent to assume that the concealed object is a handgun, based on what appears to be its visible handle, even though the assumption may be wrong. Figure 1 suggests how the argument can be visually represented by Carneades.

The original motivation of the Carneades system was to accommodate two different variations on what happens when a respondent asks a critical question.⁷⁰ On the one theory, as indicated above, when a critical question is asked, the burden of proof shifts to the proponent’s side to answer it. On the other theory, merely asking the question does not defeat proponent’s argument until the respondent offers some evidence to back it up. Carneades approaches this distinction by distinguishing three types of premises, called ordinary premises, assumptions and exceptions.

⁶⁸ Henry Prakken, ‘AI and Law, Logic and Argumentation Schemes’, (2005) 19 *Argumentation* 303-320.

⁶⁹ Douglas Walton, ‘Argument from Appearance’, (2006) 195 *Logique et Analyse* 319-340.

⁷⁰ Douglas Walton and Thomas F. Gordon, ‘Critical Questions in Computational Models of Legal Argument’, *Argumentation in Artificial Intelligence and Law*, IAAIL Workshop Series, ed. (Paul E. Dunne and Trevor Bench-Capon, Nijmegen, Wolf Legal Publishers, 2005) 103-111.

Witness testimony as a form of evidence is based not only on schemes for witness testimony and argument from expert opinion, but underlying these schemes, often argument from appearance can be found. In particular, critical questions for witness testimony evidence, for example of the kind that raise questions about observational sensitivity,⁷¹ may relate to argument from appearance.

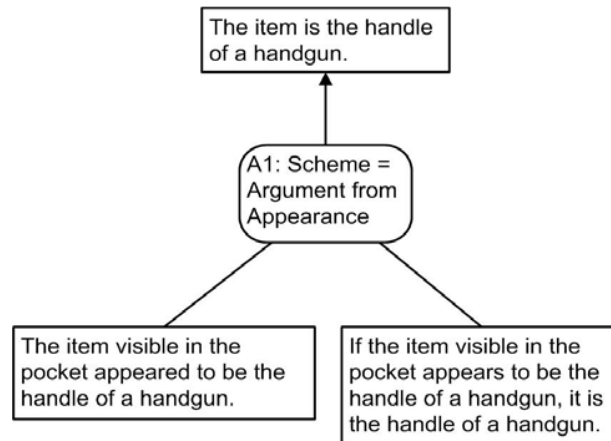


Figure 2: Carneades Argument Map of the Handgun Example

How the Carneades method of computational dialectic works as applied to legal cases has been illustrated using a case study that shows how the method uses many different argumentation schemes, not only for legal argument analysis and evaluation, but also for legal argument construction⁷². This methodology can be summarized as a series of ten steps. First, the user makes a list, called a key list, of all the statements explicitly expressed in the text of the argument. Second, the user identifies the premises and conclusion of each argument composed of the statements in the key list. Third, the user chains the arguments together in a sequence. Fourth, the user creates an argument diagram, like the one illustrated above, that visualizes an interpretation of the structure of the argumentation. Fifth, the user labels as many of the arguments as possible with an argumentation scheme. Sixth, the user labels the statements that have been accepted as true or rejected as false, depending on the current consensus of the participants, and other factors. Seventh, the Carneades software uses the arguments to reason forward from the accepted and rejected statements and the argumentation schemes that are applicable. Eighth, the system assigns proof standards, like preponderance of evidence, that apply to each statement in the graph of the argument. Ninth, the system uses the argumentation schemes as applied to the key list to reveal implicit premises. Tenth, the system evaluates the argumentation in the case, using the argumentation schemes, proof standards, and other components of the method.

The solution of Carneades to the problem of critical questions is helped by its ability to support structures that enable implicit premises to be revealed dynamically as argumentation proceeds. The status of statements as accepted or not can change during the course of continued

⁷¹ Above n. 43, at 103.

⁷² Thomas F. Gordon and Douglas Walton, 'A Carneades Reconstruction of Popov v Hayashi', Knowledge Engineering Review, to appear, 2010.

argumentation. The acceptability of a statement also depends on its proof standard. The four proof standards postulated by Gordon and Walton according to their model are: scintilla of evidence, preponderance of the evidence, dialectical validity, and beyond a reasonable doubt.⁷³ The account of the standards in the model may not correspond to those in law, where other standards may be recognized, and where the standards may not be formulated in such precise ways. Still, the model provides a framework for beginning the task of formulating conditions of successful proof in a computational and logical model. In response to an argumentation scheme, each critical question is modeled as placing a burden of proof on the proponent, or as placing the burden on the respondent. Even after the respondent has made an issue out of the statement in an exception, the statement continues to hold until sufficient evidence has been presented to show the statement of the exception is acceptable. Thus Carneades allows the burden of proof to be assigned to either the proponent or the respondent of an argument, depending on how the premises of a given argumentation scheme are classified.

4.2.2 Taking Evidence in Law as a Core

Different fields concentrate on different questions of evidence, as stated above, for people in different fields usually use different evidence in order to draw relevant conclusions. Evidence in its broadest sense refers to anything that is used to determine or demonstrate the truth of an assertion. The word “evidence” is associated more often with law than with any other field, and the field of law can supply the most extensive recorded legacy of experience and scholarship of evidence because each country has to establish a strong judicial system to solve the disputed facts based on evidence and does its own special research on the subject of evidence. Evidence has become so closely associated with law that the term “evidence” in law often refers to the law of evidence at the present time, regarded as data presented to a court or jury in proof of the facts in issue and which may include the testimony of witnesses, records, documents, and physical objects. Professor Twining warns us that the theory equating “evidence law” with “evidence” by implication excludes or downgrades all the many lines of inquiry that can be subsumed under “the New Evidence Scholarship” and undermines a coherent conception of the subject of evidence in law.⁷⁴ Research on evidence has received relatively more attention in legal scholarship, and is mostly undertaken by judges and legal practitioners. These facts show that evidence in law is the core area of evidence scholarship. Therefore, the research on evidence science must take evidence in law as a central field, and then stretch it to other evidence theories.⁷⁵

In law, evidence can be defined as any species of proof, or probative matter, legally presented at the trial of an issue by the parties involved in the matter. In criminal cases, for example, evidence is the means whereby the prosecution seeks to show beyond reasonable doubt that the defendant is guilty of the charge and the defence seeks to cast a reasonable doubt on the charge. Evidence in law generally can be dissected into two principal parts: the law of evidence and forensic science. The law of evidence is the body of law regulating the admissibility of what is

⁷³ Thomas F. Gordon and Douglas Walton, ‘Proof Burdens and Standards’, *Argumentation and Artificial Intelligence*, ed. Iyad Rahwan and Guillermo Simari, Berlin (Springer, 2009) 239-260.

⁷⁴ Above n. 63, at 440.

⁷⁵ In the Introduction to the journal of *Evidence Science*, Professor Baosheng Zhang characterizes this nuclear field as “science of evidence in a narrow sense”. See Baosheng Zhang, Yanjiu zhengju kexue, Cujin Sifa Gongzheng, (Studying Evidence Science and Promoting Judicial Justice), (2007) 15 *Evidence Science* 4.

offered as proof in a legal proceeding. It comprises all the rules governing the presentation of facts and proofs in proceedings before a court, including in particular the rules governing the admissibility of evidence and the exclusionary rules. Forensic science is the application of science in law. It is also a multidisciplinary subject, because it also uses methods from biology, chemistry, medicine, physics, computer science, geology, and psychology.

4.2.3 *Substance-blind and Substance-based Methods*

Although there is a near infinite variety of the substance or content of evidence, Professor Schum has argued that many characteristics, credentials and principles of evidence transcend the differences between types of evidentiary data such as traces, handwriting, and witness testimony. He postulated a “substance-blind method”, which considers the basic inferential characteristics or credentials of evidence (relevance, credibility, and probative force) without regard to the substance or content of the evidence or to the context of the inquiry.⁷⁶ The substance-blind method is used to describe a particular way of categorizing forms and combinations of evidence without reference to its substantive content. Such a categorization is based on inferential properties of evidence rather than its contents. For example we can make general statements about relevance, credibility, authenticity, and probative force without reference to any particular kind of data. Significant insights, however, ordinarily come from the substance of the evidences or the context of the cases. In spite of being a strong proponent for the “substance-blind approach,” Professor Twining argues that the claim of “substance-blind approach” is quite limited for the following reasons. First, the approach does not claim to say much about the uses of evidence in different kinds of evidence (e.g. deterioration of DNA samples, the reliability of confessions, and the interpretation of texts belonging to different traditions of historiography). Second, the claims are limited to empirical, hypothesis-driven enquiries, and, in many contexts sharp distinctions between fact and value are difficult to maintain. A substance-blind approach to inferential reasoning does not, on its own, claim to throw light on such matters as the purposes of an enquiry, the conditions under which it is undertaken, how problems are framed, potentially competing interests and values, or the uses to which particularly evidentiary arguments are put.⁷⁷ During the process of determining the facts in dispute at a trial, the fact-finders may encounter any conceivable kind of substantial evidence provided by an array of different sources. Some of these sources are human assets or informants; other sources are sensing devices of various kinds. Theories of evidence should provide pragmatic and valuable method for judicial fact-finding. That requires us to not only consider substance-blind methods, but also substance-based methods for a more comprehensive approach to evidence. A substance-based method requires analysts to consider the specific content included in the evidence. For example, when we consider an instance of expert testimony, before weighing its relevance, credibility, and probative force, we should pay attention to the principle the scientific test based on, the method the scientists used, the procedure the technicians took, and even the management of the materials.

4.2.4 *Bringing Conformity with Current Scientific Findings and Standards into Judicial Proof*

⁷⁶ Above n. 60, at 71.

⁷⁷ Above n. 63, at 449.

As the gulf widens between reality as perceived by our natural sensory apparatus and reality as revealed by prosthetic devices designed to discover the world beyond the reach of this apparatus, the importance of the human senses for factual inquiries has begun to decline.⁷⁸ Stepping into the 21st century, humanity's science and technology are developing at an unprecedented rate, and the application of science and technology is going ahead by leaps and bounds. Even so, many trials still come down to which witnesses are believed. The application of science and technology to the field of law is mainly embodied in the flourishing of the scientific method of proof. It is reasonable to expect that more precise and complex scientific methods and technologies will be increasingly applied to different fields of social activities. The law also follows this epistemological inclination, one that occupies a dominant position in this historical period. To some extent, many questions that modernized litigation generates are becoming more and more technically sophisticated, as more and more facts that are very important to litigation procedures can only be discovered by advanced scientific and technological means. As there is a tendency for courts to be confronted by more evidentially diversified cases, seeking for factual truth will inevitably and more often rely on scientific evidence. These developments in turn mean there will be more dependence on expert witness testimony in litigation. Courts have given more consideration to scientific evidence like fingerprints, blood tests, DNA tests, handwriting, X-ray, polygraph and psychology, and so on. For example, DNA testing may be used to determine whether sperm found on a rape victim came from an accused party; a latent fingerprint found on a gun may be used to determine whether a defendant handled the weapon; drug analysis may be used to determine whether pills found in a person's possession were illicit; and an autopsy may be used to determine the cause and manner of death of a murder victim.⁷⁹ Of course, we should note that they are not all equally accepted by the courts due to some flaws in them. On the one hand, as the Report of the National Academy in the U.S. says, with the exception of nuclear DNA analysis, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.⁸⁰ Many forensic tests—such as those used to infer the source of toolmarks or bite marks—have never been exposed to rigorous scientific scrutiny. Most of these techniques were developed in crime laboratories to aid in the investigation of evidence from a particular crime scene, and researching their limitations and foundations was never a top priority.⁸¹ Moreover, the imperfections of DNA evidence, while in themselves not a reason to abandon the forensic use of such evidence, are particularly dangerous precisely because of their perceived infallibility. The unfettered use of technologies may threaten important values other than accuracy and security, such as privacy and fairness; and the elimination of risk and pursuit of certainty are uniquely dangerous as proffered justifications for ever-more-oppressive social control measures—such as vast national DNA databases—because they can never fully be attained.⁸² The most controversial cases involving the admissibility of polygraph, drug tests and other scientific evidence occur when other evidence is relatively sparse. In this situation courts must focus on the accuracy of the

⁷⁸ Mirjan R. Damaška, *Evidence Law Adrift* (Yale University Press, 1997) 143.

⁷⁹ The National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (the National Academies Press, 2009) s-6.

⁸⁰ Ibid, s-5

⁸¹ Ibid, s-5, 1-6.

⁸² Andrea L. Roth and Edward J. Ungvarsky, 'Book Review for Forensic Identification and Criminal Justice: Forensic Science, Justice, and Risk (by Carole McCartney)', (2009) 8 *Law, Probability and Risk* 56.

procedure.⁸³ However, new advances in science and technology, such as iris scans and facial recognition of biometric technologies, mtDNA analysis, low copy number DNA analysis, Y-short tandem repeat (Y-STR) testing and single nucleotide polymorphism (SNP) testing, are improving the accuracy of scientific evidence. Research reports on three experiments that measure the accuracy of a computer fingerprint matcher at identifying the source of simulated latent prints.⁸⁴ On the other hand, another reason that courts have difficulty in accepting scientific evidence is that jury or judges are not scientists and most of them do not have the background to bear on the expertise in cases. Fortunately, expert witnesses appointed by parties or courts can interpret the data contained in scientific evidence to help them understand scientific evidence better by using the statistical analysis approach or probability theory. For example, many statisticians who have testified for either plaintiffs or defendants in the courtroom provided many statistical methods to interpret scientific evidence such as DNA profile evidence.⁸⁵ These directions suggest the growing need for a scientific and logical system of proof that takes biological science and technology as its core. Scientific Evidence has ranked first in all kinds of means of judicial proof, and is becoming King of Evidence of the new generation in litigation.⁸⁶

4.3 The Theoretical Framework of the Comprehensive Evidence Scholarship

To establish a coherent comprehensive theory of evidence, it is necessary to shed light on its theoretical framework and clarify the elements of evidence theory and their inter-relationships. Evidence scholarship is not merely to be added in with components of science and technology, but the scientific theory of evidence needs to be its main aim. According to Professor Baosheng Zhang, the theoretical system and practical application of the theory of evidence consists of four levels in a logical order: (1) the basic theory and application of evidence science; (2) the basic theory of forensic science; (3) the applications of evidence law and forensic science; and (4) consulting services about how to use evidence rules and technological development of forensic science.⁸⁷ A simplified way to explain these four levels is to say that the theoretical framework of a comprehensive evidence scholarship for fact-finding consists of the following four interacting and partially overlapping components:

- (1) Basic theories of evidence science, which take general questions of evidence as main objects, including the definition of evidence and fact, the theory of classification of evidence, the developmental history of evidence theory, the theory of properties of

⁸³ Joseph L. Gastwirth, 'The Statistical Precision of Medical Screening Procedures: Application to Polygraph and AIDS Antibodies Test Data: Rejoinder', (1987) 2 *Statistical Science* 213-238.

⁸⁴ The first experiment used rolled prints supplied by the National Institute of Standards and Technology (NIST) to simulate latent prints. The second experiment used our own manufactured latent prints. The third experiment used latent prints supplied by NIST. In their study, An Automated Fingerprint Identification System (AFIS) was used to simulate the task that a human latent print examiner is typically asked to perform as part of ordinary casework. See Simon A. Cole *et al.*, 'Beyond The Individuality Of Fingerprints: A Measure Of Simulated Computer Latent Print Source Attribution Accuracy', (2008) 7 *Law, Probability and Risk* 165-189.

⁸⁵ Details for statistical analysis approach for interpreting scientific evidence see Joseph L. Gastwirth, *Statistical Science in the Courtroom* (Springer, 2000).

⁸⁶ Jiahong He, *Zhongguo Zhengjufaxue Qianzhan* (Expectation for Chinese Evidence Law), in *Procuratorial Daily*, Sept. 2, 1999.

⁸⁷ Quoted from a lecture entitled *Evidence Science and Its Theoretical System: the Interdisciplinary Trend of the Law of Evidence*, given by Professor Baosheng Zhang at China University of Politics and Law on Dec. 4, 2006.

evidence, the formal theory of evidence, the methodology of evidence, and the relationship between an evidence system and other systems such as politics, economics.

(2) Theory of evidence law, namely, a kind of legal evidence theory which takes all types of basic principles of legal evidence applied in criminal cases, civil and administrative cases, such as evidence competence rules, the relevance rule, rules about the production of evidence, rules about confrontation of witnesses, the hearsay rule, privileges, the character evidence rule, judicial notice, presumptions, the application of these rules and evidence law-making as main content. As stated above, this is one of the core fields of the comprehensive evidence scholarship.

(3) Forensic science, which more narrowly indicates theory of scientific evidence.

“Forensic science” may generally be defined as the application of “scientific, technical, or other specialized knowledge” to assist courts in resolving questions of fact in civil and criminal trials.⁸⁸ Generally speaking, forensic science is science used in public affairs, in a court or in the justice system. That means any science used for the purposes of the law is a forensic science, Therefore, it can cover criminalistics, engineering sciences, odontology, pathology (biology), physical anthropology, entomology, psychiatry & behavioral science, questioned documents, toxicology, dentistry, chemistry, autopsy techniques, and much more. Forensic science is another core field of the comprehensive evidence scholarship.

(4) Theory of proof, including the logic of proof, objections to supposed proofs, burden of proof, the procedure of factual proof, approaches for assessing weight of evidence, confirming evidence, standard of proof, and judicial notice and presumptions.

There are many theories that could be classified as pluralistic underpinnings of these theories that are partially overlapping. For example, the principles of proof and the law of evidence are closely related to or dependent on each other. The law of evidence governing admissibility not only concerns principles of proof, judicial notice and presumption, but also general evidential theory. This includes ontology, epistemology, and logic, as well as foundational theories such as social theory and theories of justice. As Professor Twining wrote, “[T]he study of evidence in law is fundamentally and inescapably related to the study of evidence generally.”⁸⁹ The outcome of the overlap between the law of evidence and forensic science is usually called “forensic science evidence”. There is also social-scientific evidence and nonscientific expert evidence which is the result of the law of evidence overlapping with other subjects. Social-scientific evidence involved in litigation usually builds on, and is closely related to, other bodies of knowledge concerned with human conduct. And nonscientific expert evidence encompasses a wide variety of persons who are deemed as being in possession of specialized knowledge, usually by virtue of their occupation, rather than by their background training in science.⁹⁰ The goal of comprehensive evidence

⁸⁸ Forensic science’s role in the civil justice arena is expanding. Issues range from questions of the validity of a signature on a will, to a claim of product liability, to questions of whether a corporation is complying with environmental laws, and the protection of constitutionally guaranteed individual rights.

⁸⁹ See William Twining, ‘Take Facts Seriously—Again’, in William Twining, *Rethinking Evidence: Exploratory Essays*, (Cambridge University Press, 2006) 435.

⁹⁰ P. T. C. Van Kampen, *Expert Evidence Compared: Rules and Practices in the Dutch and American*

scholarship is to find facts. The above theories interact with each other to form the theoretical framework of comprehensive evidence scholarship, and this framework provides a scientific plan for resolving fact-finding under the support of pluralistic theories.

5. Conclusion

The development of evidence theory in China has experienced a course of moving from integration between evidence scholarship and evidence law to a pluralistic evidence law. Aiming at solving the problems existing in the current evidence system and meeting the needs of judicial practice, the contemporary evidence theories of China, which take Continental legal systems as a model, also absorb many principles from the Anglo-American law of evidence. By analyzing the evidence system of China and comparing it with the Anglo-American law of evidence, we conclude that the evidence system of China not only combines principles from both Continental and Anglo-American legal systems, but also retains its own features.

On the one hand, due to differences of history and culture, there are some key distinctions between Chinese evidence law and Anglo-American evidence law systems. These include a different institutional design, a different system for classification of evidence, different constraints on the right to collect evidence by courts, and different modes of appraising evidence. To some extent these distinctions reflect the heterogeneity of evidence theory in different contexts. On the other hand, in the course of a modernization of evidence theory that is influenced by the common method of discovering truth among different cultures, the increasing homogeneity among different system of evidence is being strengthened by the application of science and technology in courts. These developments are bound to further reduce the past distinctions between different evidence systems and they suggest that the evidence law in China is moving from pluralistic model towards a comprehensive evidence scholarship. As we have shown, comprehensive evidence scholarship needs to be both interdisciplinary and multi-disciplinary in nature. It is based on pluralistic fundamental theories that have the flexibility to cope with new directions, reveal the basic issues of evidence science, and make its systemic theories build on concepts from epistemology, logic, philosophical value, theory of efficiency, theory of information and other theories of natural science. Comprehensive evidence scholarship takes evidence in law as a core area because the field of law can supply the most extensive recorded legacy of experience and scholarship of evidence, as its use of the central notion of relevance has shown. We conclude that both the substance-blind method and the substance-based method are needed for analyzing evidence. The framework of a comprehensive evidence scholarship for fact-finding we have proposed can be said to consist of four interacting and partially overlapping components: basic theories of evidence science, theory of evidence law, forensic science, and theory of proof. These theories need to closing interact with each other, forming the theoretical framework of comprehensive evidence scholarship.

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Criminal Justice System (Intersentia Rechtswetenschappen, 1998) 7-8.

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Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

The various roots of Civil Litigation in China and the influence of foreign laws in the global era*

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Abstract: The article seeks to analyse the historical influences of the chinese procedural law system and relate them with our modern era of globalization.

Keywords: Civil Procedure. China.

1. Introduction

My report focuses on the influence of foreign laws on China's civil litigation over the past two decades, and introduces the present circumstances and issues relating to legal institutions, theory and practice.

Part One: The various roots of China's civil litigation

Before I begin to estimate the degree to which China's civil litigation has been influenced by foreign law over recent years, it is necessary to mention a number of roots of the system which form the basic framework. To begin with, even in the period before China became entrenched in globalization, China's civil litigation did not simply progress independently by preserving fixed or old traditions, nor was it the result of transferred or received institutions or theories from one single country. One of the characteristics of China's

* Translated from Japanese by **Melanie Trezise**.



civil litigation system is the existence of extremely broad and complicated roots, brought about by the experience of an era of major transformation of modern society.

The long period up until the mid-nineteenth century marked the era of the so-called indigenous laws of China, at which point strong advancements began under the influence of confrontation with Western European powers. At that time, the “hearing civil case”, which existed at the basic level of the state and county bureaucratic systems, was the representative system for civil dispute settlements that corresponded with lawsuits and trials. Focusing on the characteristics of this system, Professor Shuzo SHIGA, an eminent Japanese scholar in the field of Eastern legal history, has described the “hearing civil case” as ‘didactic conciliation’.¹ Its essence retains a strong influence on present day civil litigation in China.

With the invasion by Western powers in the nineteenth century, China was increasingly unable to maintain its unique legal system and attempted to fully receive western European modern laws in the form of legislative processes through legal codification at the end of the Qing dynasty, approximately 100 years ago. Japanese academics were invited as advisors on legislation for the civil litigation system and drafts were made using German laws as the blueprint, though these were withdrawn without being completed as laws with the fall of the Qing dynasty. As I will touch upon later, the German and Japanese legal trends within the basic framework of the litigation system are able to be seen clearly in Chinese civil litigation today.

On the other hand, in the region called the “base area”, controlled by the communist party during the Sino-Japanese war (1937-1945), a new civil litigation style was devised in a form to serve the purposes of the revolution ideology and the objectives of the war. This civil litigation style had the structure and content such that when the parties instituted a claim, a certain judge, or even executive members of the party, would go to the site of the dispute, collect evidence and clarify the facts, and then a group of the party’s peers would propose a decision and convince the parties to accept it. These characteristics were readily evident with slogans such as “fact investigation (or inquiry into facts)”, “mediation focus” and “mobilization

¹ See shuzo Shiga, *Law and Adjudication of Qing Dynasty’s China*, Tokyo: Sobundo Press, 1984, 231-257. (滋賀秀三、清代中国の法と裁判、東京：創文社、1984年、231-257頁.)



of the masses”. This kind of trial system later formed the pragmatic basis for dispute resolution in the courts of the People’s Republic of China, and is an element which cannot be ignored as being a very important legal root, even in observing civil litigation in China today.

With the formation of the People’s Republic of China, all laws were abolished by the Kuomintang government, including the civil litigation law, and for over three decades between 1949 and 1982, no legislation existed in relation to civil litigation. However, there was a period in the 1950s in which the basic concepts, principles, and theory systems of the so-called socialistic civil litigation studies from the former Soviet Union were enthusiastically studied and introduced. This period of learning from the former Soviet Union was short-lived, and although the influence was limited, this influence filled the void left after the rejection of German-style civil litigation studies, and *prima facie*, it provided an academic basis to civil litigation of the time, which was almost completely deficient in theory. In this sense, yet another root of present day Chinese civil litigation comes from the laws of the former Soviet Union, in the form of socialist law.

However, restricting the discussion only to the practice of the civil courts at that time, instead of applying the letter of the law and theory, while this was frequently controlled by party ideology and policy or political campaigning, a “mediation focused” trial system was maintained which was essentially formulated in the “base area” during the war of 1937-1945. It is also important to point out that at this time, China’s civil litigation, which was experiencing social upheaval such as in the “cultural revolution” and which was cut off from the world, was almost entirely divorced from foreign legal influence.

Part two: The influence of foreign laws in the period of reform and liberalization

The influence of foreign laws began to emerge prominently from the period of reform and liberalization in the 1980s, especially in 1982 with the formulation of the first law on civil litigation since the establishment of the People’s Republic of China. This law emphasized the



collection of evidence and fact finding by judges and viewed from the prescribing of the principle of “emphasizing mediation”, and so on, it can of course be said that the law was essentially built upon the “new traditional” trial system which traced back to the “base area” period of the communist party revolution. However, by developing the *Allgemeiner Teil-Besonderer Teil* (general and specific rules) structure, it is clear that it adopted the framework of the German civil litigation law. At the same time, with the trial session, which is similar to court opening procedures corresponding to the hearing date and lawsuit participation, it is possible to say that this code was joined by the lessons learned from the civil litigation law and legal theory of the former Soviet Union.² Moreover, legislators as well as general academics barely made mention of foreign legal influence at the time. For example, if we go to the two most representative textbooks published in the late 1980s, one of these raised foreign laws under the heading “Civil litigation laws in bourgeois society” and criticized these simply as “protecting and giving into the service of bourgeois profits”³. The description contained in the other textbook was that “we must refer to the successful legislative techniques and beneficial methods of foreign countries”, though concrete examples of these points of reference were given only as “the areas of jurisdiction and legal assistance in external civil and financial matters related to foreign countries”.⁴ Looking back on this now, the mood of China’s civil litigation academic community throughout the entire 1980s was the feeling of political and ideological barriers to stating that there was a connection with foreign laws, and the introduction of comparative law materials and research was not an especially active area of academia. Translation work on the civil litigation laws of foreign countries and their theories

² Please refer to the following materials for more details on the civil litigation system of the former Soviet Union in these areas: Yaxin Wang, On the Structure of Chinese Civil Procedure, Kazuyuki Tokuda et al., edit, *The Phases of Modern Judicial System: To Professor Yasuhei Taniguchi for His Seventy’s Birthday*, Tokyo: Seibundo Press, 2005.264-265.

王亞新、中国民事訴訟の審理構造についての一考察、谷口安平先生古稀祝賀『現代民事司法の諸相』、東京：成文堂、2005年、264－265頁）；

Yiwei Pu, *The Third Person in Civil Procedure*, Unpublished Paper at Tsinghua University.117-121. (蒲一葦、民事訴訟第三人制度研究、清華大學法學博士學位論文、117－121頁.)

³ Fabang Cai, edit, *Civil Procedure*, Beijing: Pekin University Press, 1988, 11-12. (柴發邦編、民事訴訟法學、北京大學出版社、1988年、11－12頁.)

⁴ Huaian Wang, edit. *Chinese Civil Procedure*, Beijing: People’s Court Press, 1988, 18. (王懷安編、中国民事訴訟法教程、人民法院出版社、1988年、18頁.)



was undertaken sporadically in the form of providing “internal reference” for the purpose of providing internal reference materials for legislative bodies, universities and so on, and translations for sale remained quite insubstantial.

However, this mood was transformed from the 1990s, and especially after 1992 with the rapid marketization of the economy. In legislation, and its interpretation or educative research, citing the civil litigation system of foreign countries became normal and no ideological barriers were felt. The comparative research of civil litigation became popular, and as for all other fields, there has been an unparalleled translation boom in relation to civil litigation. In the background to this situation, the influence of foreign laws was spreading throughout the Chinese civil litigation academic community with a force never seen before. It goes without saying that it is this period after the 1990s when society and economics in China became more completely and profoundly caught up in globalization.

Foreign civil litigation systems and theories were perceived positively, and one important catalyst for driving the general attitude of actively studying these was the overall reform of the civil litigation system in 1991, and the completion of the civil litigation law. This newly formulated law took on many elements from continental European and Anglo-American laws. For example, the basic ‘*Allgemeiner Teil·Besonderer Teil*’ (general and specific) structure derived from German law, *Mahnverfahren* (summary procedure) and *Aufgebots Verfahren* (Right-exclusion judgment procedure) and so on, clearly involve elements introduced from civil litigation in continental European countries. We can also find clauses in this law which were developed with reference to American law. Representative of this is Article 55 which now provides for “a representative in cases with an undetermined number of parties” for litigation with numerous parties or group litigants. The object of this article is so that even when litigating in matters where the number of litigants is undetermined, through the procedures for notification, registration and so on, an elected representative is entrusted with pursuing the litigation and it is possible for the decision from that case to be incorporated afterwards by latent parties to the same dispute in other litigation also. Seen in this way, the system of “represented litigation for an undetermined number of parties” is found situated beyond the



general framework of continental European law relating to litigation involving a large number of parties and also obviously has similarities with class actions suits in American law.⁵

Furthermore, the introduction of the doctrines and theories of foreign countries' civil litigation became popular in the 1990s. For example, there have been arguments surrounding a number of important concepts such as the "onus of proof" and the "*Verhandlungsmaxime*" (doctrine of oral arguments), and a new climate has transpired in the civil litigation academic community. For example, throughout the 1980s "onus of proof" was generally only understood at the level of corresponding with "subjective" or "behavioral" burden of proof or "the burden of producing evidence". Facing these circumstances, some academics at the beginning of the 1990s relied on the theories of Leo Rosenberg to actively introduce the concept of "objective" or "resultative" burden of proof, and began to emphasize the most crucial parts of the concept of the onus of proof such as at the level of solving non liquet problems.⁶ In the end, understanding the "onus of proof" on both subjective and objective levels gained consensus in the civil litigation academic community, becoming a general idea and commonly accepted notion. In time, this academic consensus ushered in the basic concept of adversarialism, that is, that in the case of non liquet the party with the burden of proof must accept the risk of unsuccessful litigation, and this consensus also played a large part in the litigation system itself and the management of court administration. Furthermore, as I will touch upon in the next section, this understanding of "onus of proof", as an impact from foreign scholarship, is connected to the dissemination of the concept of "legal truth" (procedurally restricted truth), replacing the concept of the "absolute, substantive truth", and the establishment of a system of "time limits for evidence" (the effective loss of a right in relation to late presentation of offensive and defensive means).

⁵ There were a number of introductions to "class actions" before and after this Article was promulgated. For an explanation on how legislative bodies were also influenced by these, see: Yu Fan, edit, *Group Litigation: About its Problems of System and Practice*, Beijing: Pekin University Press, 2005.274-276. (範愉編著、集團訴訟問題研究、北京大學出版社、2005年、274—276頁.)

⁶ For a representative work on this see: Hao Li, *On Burden of Proof in Civil Procedure*, Beijing: Chinese Law and Politic University Press, 1993. (李浩、民事舉証責任研究、北京：中國政法大學出版社、1993年.) This study by Professor Li Hao is primarily based on articles by Taiwanese academics and other translated works, and takes into consideration the theories of Rosenberg and others, and the doctrine of the onus of proof in German and Japanese law.



Moreover, if we raise one more example of a large influence on China's civil litigation academic community and court practices, there is the introduction of the "*Verhandlungsmaxime*" (doctrine of oral arguments) by borrowing important concepts and principles from civil litigation theory of continental European law. For a long time in contemporary Chinese civil litigation, there was a customary practice of judicial inquisition and in the academic community also, the principle of judicial inquisition (*Untersuchungsgrundsatz*) was dominant and there was a background of having rejected the "*Verhandlungsmaxime*" on ideological grounds without sufficiently understanding its sense and purpose. The term used in place of "*Verhandlungsmaxime*" in the text books and so on was "the principle of oral arguments", and this takes on the meaning that both parties in all circumstances must make assertions and oral arguments, though this would not bind the judge in deciding whether the parties would be heard or not. In the end of the 1980s, the courts of the People's Republic of China launched a reform into civil litigation procedure in order to amend the custom of judicial inquisition⁷, however, the civil litigation academic community at the time was still not sensitive to the reformist trend and no solid basis could be given to the movement in practice from the point of view of the doctrine of oral arguments. As well as introducing in detail the concepts and content of the "*Verhandlungsmaxime*" in the civil litigation of Germany and Japan, the "principle of oral arguments" in the Chinese legal academic circles had the position of a "non-binding principle" and the argument that this should be replaced with "*Verhandlungsmaxime*" began to be made public from the middle of the 1990s, starting to become the dominant theory.⁸ Recently, through the publication and promulgation of the new litigation rules by the Supreme Court of the People's Republic of China, the legal principles similar in content to the "*Verhandlungsmaxime*", have eventually become accepted into the Chinese civil litigation system and were able to be transferred into practice.⁹

⁷ See Yaxin Wang, *The Study on Chinese Civil Procedure*, Tokyo: Nippon Hyoronsha Press.1995,12-56. (王亚新、中国民事裁判研究、東京：日本評論社、1995年、12-56頁.)

⁸ For a representative discussion of these findings, see Weiping Zhang, *Review the principle of oral arguments*, Beijing: Jurisprudence Study 6,1996. (張衛平、「我国民事訴訟弁論原則重述」、法學研究1996年第六号.)

⁹ For a discussion on this new trend, see: Yaxin Wang, *The New Trend of Chinese Civil Procedure: about the New Rules of the Supreme Court*, Sapporo:Hokkaido University Jurisprudence Study, 54-6,2004.227.



The increasing influence of foreign laws throughout the 1990s was adopted into the legislative system and consisted not only of the introduction of theories and legal principles, but extended to the general perception and basic ideas of litigation and procedure. Through this, the terms and concepts such as “procedural justice” and “due process” gained currency as “civil rights” in China’s civil litigation academic community and were expressed as phenomena such as the concepts becoming slogan-like or even epidemical. Until the end of the 1980s, it was commonly recognized that civil litigation laws, as procedural rules, had an instrumental existence for the sake of essentially realizing substantive justice, a recognition which was also shared by those in the study of civil litigation laws, and civil litigation seemed to take its place at the outer edge of the legal academic world. However, discussions began to be introduced regarding due process in Anglo-American law and procedural justice in Japanese academic circles,¹⁰ and gradually it came to be widely understood that the legal process and court procedures had a major part to play in Western legal systems and philosophy. Coupled with the expansion of judicial system reform, which by the second half of the 1980s had become a frantic boom, the importance of procedure was frequently referred to not only by civil litigation academics, but also by researchers in various fields such as legal philosophy and substantive legal studies. These days, it is no exaggeration to say that these concepts are now shared widely throughout the legal academic community to the extent that “due process” and “procedural justice” are basic keywords in the legal system and legal studies as a whole. These are also the most remarkable signs and results of the influence of foreign law.

Against this background of the various movements outlined above, it should be also pointed out that there now exists the biggest translation boom since the creation of the People’s Republic of China (or alternatively, over the thousands of years of Chinese history).

(王亜新、中国民事訴訟の新しい展開——最高人民法院の証拠に関する最新の訴訟規則を中心として、北大法学論集第54巻第6号、2004年、227頁以下.)

¹⁰ For an introduction to due process, see: Weidong Ji, *On Legal Procedure*, Beijing: Chinese Social Science, 1993, 1 (季衛東、論法律程序、中国社会科学1993年第1号); for an introduction on the debate in Japanese legal academic circles, see: Yasuhei Taniguchi (translated by Yaxin Wang and Rongjun Liu), *Procedural Justice*, Beijing: Chinese Law and Politic University Press, 1995. (谷口安平著、程序的正義与訴訟(王亜新、劉榮軍訳)北京: 中国政法大学出版社、1995年) (additionally, this translation was published in an expanded edition in 2002.)



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This boom, which embraces any number of fields includes the domain of civil litigation, dates from the beginning of the reform period and has continued until today. The results of this boom should be given our attention, especially those since the last half of the 1990s. Below I will cite, though not exhaustively, the major translated works in the following order: procedural codes/litigation rules; textbooks; and research works/collected papers.¹¹

First, for reasons of geographical proximity to Japan, the large number of civil litigation researchers from China who have studied in Japan both long- and short-term, as well as the relatively frequent exchanges between the civil litigation academic circles of China and Japan, the period of Japanese publication translations came fairly early and as a result of that, it probably also ranks the highest in terms of the quantity translated. The following are the main translated works with regard to civil litigation in Japan.

The New Civil Procedure Law of Japan,(translated by Lvxuan Bai). Beijing: Chinese Legal System Press 2000.白緑玄訳、日本新民事訴訟法、中国法制出版社、2000年；

Hajime Kaneko and Morio Takesita (translated by Lvxuan Bai.) Civil Procedure (new edition), Beijing: Law Press, 1995.兼子一、竹下守夫著、白緑玄訳、民事訴訟法（新版）、法律出版社、1995年；

Takaaki Hatori,et al, (translated by Xingyou Zhu), Civil Trial Procedure of Japan, Xi'an: Shannxi People Press,1991.羽鳥高秋、ヘンダソン著、朱興有訳、日本民事審判程序、陝西人民出版社、1991年；

¹¹ In addition, there are also great numbers of books and articles written by Chinese scholars, which introduce or provide research on the civil litigation systems and theories of various foreign countries, however I will not go into them here.

Furthermore, in the list below I provide the original title, publisher, date of publication and so on where these are known. However, where these are not known, for the reason of not being clear in the collected works from translators and translated books, I have had to give an abbreviated description.

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Hidero Nakamura (translated by Gang Chen et al.) Textbook on New Civil Procedure,
Beijing: Law

Press, 2001. 中村英郎著、陳剛ら訳、新民事訴訟法講義、法律出版社、2001年；

Yasuhei Taniguchi (translated by Yaxin Wang and Rongjun Liu), Procedural Justice,
Beijing: Chinese Law and Politic University Press, First Edition 1995 (improved edition,
2004). 谷口安平著、王亜新、劉栄軍訳、程序的正義与訴訟、中国政法大学出版社、初版
1995年（増補版、2004年）；

Hiroshi Takahashi (translated by Jianfeng Lin), Civil Procedure: Deep Analysis on System
and Theory. Beijing: Law
Press, 2003. 高橋宏志著、林劍峰訳、民事訴訟法：制度与理論の深層分析、法律出版社、
2003年；（重点講義・民事訴訟法、有斐閣、1998年）

Yoshimasa Matsuoka (translated by Zhiben Zhang), On Civil Evidence, Beijing: Chinese
Law and Politic University Press, 2004.
松岡義正著、張知本訳、民事証拠論、中国政法大学出版社、2004年；

Takeshi Kojima, et al (translated by Zuxing Wang), The History and the Future of Judicial
System, Beijing: Law Press,
2000. 小島武司ら著、汪祖興訳、司法制度的歴史与未来、法律出版社、2000年；

Takeshi Kojima (translated by Gang Chen, et al), The Theory and Practice of Litigation
System Reform, Beijing: Law Press,
2001. 小島武司著、陳剛ら訳、訴訟制度改革の法理与実証、法律出版社、2001年；（民
事訴訟の基礎法理、有斐閣、1988年）

Takao Tanase (translated by Yaxin Wang), Dispute Resolution and Adjudication System,
Beijing: Chinese Law and Politic University Press, 1st edition 1994(2nd edition
2005) 棚瀬孝雄著、王亜新訳、糾紛的解決与審判制度、中国政法大学出版社、初版1994
年（新版2005年）；



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Yoshinobu Someno (translated by Jianfeng Lin), Civil Adjudication System in the Transforming Eras, Beijing: Chinese Law and Politic University Press, 2004. 染野義信著、林劍峰訳、転変時代の民事裁判制度、中国政法大学出版社、2004;

Takeshi Kojima and Shin Yito, edit. (translated by Jue Ding), The Methods of Alternative Dispute Resolution, Beijing: Chinese Law and Politic University Press, 2005. 小島武司、伊藤真編、丁捷訳、訴訟外糾紛解決法、中国政法大学出版社、2005年;

Morio Takeshita (translated by Weiping Zhang and Rongjun Liu), Execution Law, Chongqing: Chongqing Press, 1991. 竹下守夫著、張衛平、劉榮軍訳、強制執行法、重慶出版社、1991年;

On the other hand, the interest in German law, one of the origins of Japanese civil litigation laws, has grown in recent years and as the number of researchers who go directly to Germany to study is increasing each year, there are also many translated works on German civil litigation, which are also garnering respect. The main works are given below.

Civil Procedure Law of Germany, (translated by Huaishi Xie). Beijing: Chinese Law and Politic University Press, 2001. 謝懷栻訳、德意志連邦共和国民事訴訟法、中国法制出版社、2001年;

Dieter Knoringer (translated by Hanfu Liu), Germany Civil Procedure Law and Practice. Beijing: Law Press, 2000. 著、劉漢富訳、德国民事訴訟法律与実務、法律出版社、2000年;

Othmar Jauemig (translated by Chui Zhou), Zivilprozessrecht, 27th edition, Beijing: Law Press, 2003. Othmar Jauemig著、周翠訳、民事訴訟法（第27版）、法律出版社、2003年; (Zivilprozessrecht, 27th edition, Verlag C. H. Beck OHG, München, 2002)

Hans-Joachim Musielak (translated by Chui Zhou), Grundkurs ZPO, Beijing: Chinese Law and Politic University Press, 2005. Hans-Joachim



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Musielak著、周翠訳、德国民事訴訟法基礎教程(第6版)、中国政法大学出版社、2005年；
(Grundkurs ZPO, Verlag C. H. Beck OHG, München, 2002)

Hans Pruetting (translated by Yue Wu), Modern Problem of the Burden of Proof, Beijing: Law Press, 2000. Hans Pruetting著、吳越訳、現代証明責任問題、法律出版社、2000年；

Leo Rosenberg (translated by Jinghua Zhuang), Burden of Proof: on the Base of Civil Code and Civil Procedure Code of Germany, Beijing: Chinese Law and Politic University Press, 2002. Leo Rosenberg著、莊敬華訳、証明責任論：以德国民法典和德国民事訴訟法典為基礎、中国法制出版社、2002年； (Die Beweislast, 4, Aufl. 1956, C. H. Beck'sche Verlagsbuchhandlung, München)

M Stürner edit. (translated by Xiuju Zhao), Collection of Civil Procedure of Germany. Beijing: Chinese Law and Politic University Press, 2005. M Stürner編、趙秀挙訳、德国民事訴訟法學文粹、中国政法大学出版社、2005年；

Simultaneously, in American civil litigation also, there has been scholarly interest in the representative domain of Anglo-American law to date, and by the 1980s, there were already resources on American civil litigation published for use as learning materials in comparative law in one section of universities. Heading towards the 1990s, many of the bulky textbooks were translated further, and even the somewhat alternative textbooks were published, aimed at the greater studying convenience for researchers and students with English capabilities, which catalogued the contrast between the English originals and the Chinese translations.

American Federal Rules of Civil Procedure, (translated by Lvxuan Bai and Jianlin Bian), Beijing: Chinese Law and Politic University Press, 2000. 白綠玄、卞建林訳、美国連邦民事訴訟規則、中国法制出版社、2000年；



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Green. M. D. An Introduction to American Civil Procedure, (translated by Law Department, Literature School of Shanghai University). Beijing: Law Press, 1988. 著、上海大学文学院法律学系訳、美国民事訴訟程序概論、法律出版社、1988年；

Geoffrey. C. Hazard, Michele Taroffo (translated by Mou Zhang), American Civil Procedure: An Introduction, Beijing: Chinese Law and Politic University Press, 1998. Geoffrey. C. Hazard, Michele Taroffo 著、張茂訳、美国民事訴訟法導論、中国政法大学出版社、1998年； (American Civil Procedure: An Introduction, Yale University Press, 1993)

Introduction the Federal Courts, (translated by Weijian Tan et al), Beijing: Law Press, 2001.
湯維健ら訳、美国連邦地区法院民事訴訟流程、法律出版社、2001年； (Introduction the Federal Courts, Federal Judicial Center Series, Program Three, 1998)

Stephen N Subrin、Margaret Y. K. Woo (translated by Yanmin Cai and Hui Xu), The Nature of American Civil Procedure: In Historical, Cultural and Practical Perspectives. Beijing: Law Press, 2003. Stephen N Subrin、Margaret Y. K. Woo 著、蔡彦敏、徐卉訳、美国民事訴訟の真諦、法律出版社、2003年； ()

Stephen N Subrin, Martha L. Minow, Mark S. Brodin, Thomas O. Main (translated by Yulin Fu et al), Civil Procedure: doctrine, practice, and context, Beijing: Chinese Law and Politic University Press, 2004. Stephen N Subrin, Martha L. Minow, Mark S. Brodin 著、付郁林ら訳、民事訴訟法：原理、実務与運作環境、中国政法大学出版社、2004年； (Civil Procedure: doctrine, practice, and context, Aspen Law & Business, 2000)

Jack H Friedenthal, Mary Kay Kane and Arthur R Miller (translated by Dengjun Xia et al), Civil Procedure, Beijing: Chinese Law and Politic University Press, 2005. Jack H Friedenthal, Mary Kay Kane and Arthur R Miller 著、夏登峻ら訳、民事訴訟法、中国政法大学出版社、2005年；



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Stephen C. Yeazell, *Civil Procedure, Casebook Series*, 5th edition, Zhongxin Press, 2003.
中信出版社2003年

Furthermore, the following translated English works are not from certain countries but concern European or American civil litigation generally, and international comparative studies.

Bing Song edit, *Collection of Trial System and Adjudication Procedure of America and Germany*, Beijing: Chinese Law and Politic University Press, 1998. 宋冰編譯、讀本：美国与德国的司法制度与司法程序、中国政法大学出版社、1998年；

Mauro Cappelletti, edit. (translated by Junxiang Liu, et al), *Welfare States and Access to Justice*. Beijing: Law Press, 2000. Mauro Cappelletti編、劉俊祥ら訳、福利国家与接近正義、法律出版社、2000年；

Mauro Cappelletti, et al (translated by Xin Xu), *The Basic Procedural Guarantee of Parties and Civil Litigation in the Future*. Beijing: Law Press, 2000. Mauro Cappelletti, ら著、徐昕訳、当事人基本程序保障権与未来的民事訴訟、法律出版社、2000年；

Mirjan R. Damaška (translated by Ge Zheng), *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, Beijing: Chinese Law and Politic University Press, 2004. Mirjan R. Damaška著、鄭戈訳、司法和国家権力の多種面孔、中国政法大学出版社、2004年；(The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, Yale University Press, 1986)

Adrian A S Zuckerman, edit. (translated by Yulin Fu, et al), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Beijing: Chinese Law and Politic University Press, 2005. Adrian A S



Zuckerman編、付郁林ら訳、危機中の民事司法：民事訴訟程序の比較視角、中国政法大学出版社、2005年； (Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, Oxford University Press, 1999)

Additionally, there are many codes and rules translated and published regarding the civil litigation laws of countries other than those given above. Please see the translations of the representative laws given below for examples:

New Civil Procedure Code of France, (translated by Jiezhen Luo), Beijing: Chinese Legal System Press, 1999. 羅結珍訳、法国新民事訴訟法典、中国法制出版社、1999年；

Jean Vincent, Serge Guinchard (translated by Jiezhen Luo), Procédure Civile, 25th édition, Beijing: Chinese Legal System Press, 2001. Jean Vincent, Serge Guinchard 著、羅結珍訳、法国民事訴訟法要義(上、下)、中国法制出版社、2001年； (Procédure Civile, 25th édition, Dalloz, 1999)

Jean Vincent, Jacques Prévault (translated by Jiezhen Luo), Voies D'Execution et Procédure De Distribution, 19th édition, Beijing: Chinese Legal System Press, 2002. Jean Vincent, Jacques Prévault 著、羅結珍訳、法国民事執行程序法要義(上、下)、中国法制出版社、2002年； (Voies D'Execution et Procédure De Distribution, 19th édition, Dalloz, 2002)

The Rules of Britain Civil Procedure, (translated by Xin Xu), Beijing: Chinese Legal System Press, 2001. 徐昕訳、英国民事訴訟規則、中国法制出版社、2001年；

Civil Procedure Code of Russia, (translated by Daoxiu Huang), Beijing: Chinese People's University Press, 2003. 黄道秀訳、俄羅斯連邦民事訴訟法典、中国人民公安大学出版社、2003年。



Part three: The dynamics between the influence of foreign laws and Chinese civil litigation

Historically, China has, for a long time, been proud of its own legal traditions, which can be said to have a legal personality not easily open to the incorporation of foreign legal influence due to dispute resolution systems corresponding to civil litigation. In this tradition, the resourceful and capable procedures and techniques of mediation had been developed. This personality is also reflected in phenomena such as the Communist party revolution's rejection of European and American legal systems and following from this trend, the declaration of a total divorce from civil litigation laws. On the other hand, in recent years, Chinese civil litigation in a different era has the background of actively learning about systems and theories from any number of foreign countries, and of being influenced by them. This is also a kind of historical "path dependence" and is thought to have exerted a considerable effect on the global era which followed. In the period since the 1980s, reform and the opening up of Chinese society, in the sense of starting to participate in world-scale globalization, has provided the background to urge increased foreign legal influence on the field of civil litigation. Specifically, however, through what kind of social conditions and by what dynamics was foreign legal influence increased? This question is dealt with below.

As I have touched upon in the sections above, the process and mechanisms which increased foreign legal influence in the field of civil litigation is in fact deeply tied to "adjudication system reform" in the courts of the People's Republic of China which began in the second half of the 1980s. Originally, this reform, which related to the specific methods of litigation practice and procedures, was not born from the reception of some kind of influence from foreign civil litigation systems, but was, unexpectedly, almost entirely set into motion "endogenously" by the internal situation of the courts of the People's Republic of China. The origins of this reform in an attempt to amend the procedural customs of judicial inquisition and the strengthening of the "onus of proof", or in other words, shifting the onus and responsibility for the collection of evidence from the judge to the parties. In the background to this



movement were a number of changes to social conditions brought about by the major historical turning point of China's reform and opening-up. There was a high incidence of problems involving assets and financial disputes along with the large scale transition of people goods and capital, which emerged as a phenomenon directly related to civil litigation, and it was many of these cases which swamped the courts of the People's Republic of China. For example, the number of civil trial cases received in 1979 was still less than 300-odd thousand cases, but by 1989 this had swelled to approximately 2,500,000 cases which represents an impressive increase of almost 800 percent over 10 years. These circumstances meant that in each individual matter the courts of the People's Republic of China reached the limits of their human and physical resources in order to research facts and collect evidence. Therefore, the very practical considerations to do with the "efficiency" of the courts, such as economizing on the courts' resources and receiving and dealing with a higher number of cases within a limited period of time, were reform-motivated and became connected with the slogan of "strengthening the onus of proof" on the parties.

There are two reasons why this relationship was made possible. One reason is the incorporation of foreign legal theories, and the other, more basic reason is the permeation of society with the doctrine that commercial goods equate to a market economy. The academic movement which introduced continental legal theory on the concept of "onus of proof" could already be seen from the beginning of the 1980s in one section of the civil litigation academic community, but without really attracting a response from those in legal practice, the discussion regarding this concept and doctrine was for the most part brought to a standstill at a fairly premature level. However, once the trial system reform began in the courts of the People's Republic of China, to shift the burden of evidence collection to the parties in the circumstances given above, the concept of the onus of proof along with the corresponding foreign legal theory suddenly came under the spotlight. The phrase "onus of proof" frequently made an appearance in the internal court procedural rules and reports, and furthermore the theories learnt from foreign laws were also soon adopted as a foundation to lend legitimacy to trial system reform. Conversely, this attitude of legal practitioners greatly stimulated discussion in the academic



community and was not only limited to continental law, but further popularized the impassioned introduction of related concepts from foreign civil litigation systems such as the “burden of producing evidence” and the “burden of persuasion” from Anglo-American law. However, at a more basic level, in the background of these concepts and theories borrowed from abroad forming the legitimizing foundation for Chinese court practice, the logic of private autonomy and self-responsibility was of course infiltrating society based on the concept that commercial goods equate to a market economy, which followed China’s liberalization and reform. The court custom of judicial inquisition was reformed by the courts, and the slogan or catch phrase of “strengthening the onus of proof” in order to get the parties to take on the burden and responsibility of collecting and presenting evidence, had an affinity with the market economy behavioral patterns of subject autonomy and self-responsibility. The start of the trial system reform which gave effect to these principles, occurred after these market principles were introduced to the so called planned economy system after a finite period of time, a timing which was in no way accidental. This also formed the general background for the movement brought about by the market economy which was to actively introduce civil litigation systems and theory from foreign countries.

Through the changes to the social conditions and environment given above, the ideological barriers were removed and the social groundwork for receiving foreign legal influence was prepared in order to learn legal concepts and theories from foreign countries, however in the domain of civil litigation, the process itself of learning from foreign countries and accepting their influence naturally satisfies a certain kind of internal logic and has come via a unique path. In other words, the influence of foreign laws on the Chinese civil litigation academic community was initially fragmented and limited only to seemingly “helpful” fields and concepts. Nevertheless, following the continued expansion of reform at the level of legal practice and the development of comparative legal studies in the academic community, this influence eventually became more principled and systematic and went as far as the basic procedural structure and fundamental philosophies or overall litigation system. Looking at this specifically, the trial system reform, which began with the “strengthening of the onus of proof”



was, by and large, not only pragmatically and opportunistically motivated at aimed at “improving efficiency”. In the academic community, which had been stimulated by this turn of events and was experiencing a boom, the study of comparative law and the introduction of foreign laws were similarly unsystematic and there was a sense that this was a “piecemeal” movement. Similar to the reaction to practical speculation that “onus of proof” was to shift the burden of the collection of evidence onto the parties, the phrase “onus of proof” initially only had the meaning of the responsibility to submit evidence which was not disadvantageous and from which there was no risk of losing a case. In other words, while preserving the concept of the “absolute substantive truth”, even more so the general thought at the time was that in order to get the parties to take on the burden of following up on litigation, the division of roles between the parties and the court with regards to the collection and presentation of evidence was not to be apportioned evenly, but to have a kind of multi-layered structure which expressed each role in different dimensions. However, in reality, there were no legal means by which to enforce the parties to collect and present resources for litigation and in practice there was a tendency for the burden of investigating facts and collecting evidence to fall to the courts, and realizing the reform goal was extremely difficult. Under these circumstances, the introduction of the concept and related theory of ‘objective’ or ‘resultative’ “onus of proof” from abroad provided an invaluable catalyst for a breakthrough on the difficult aspects in practice as given above. The concept that parties in non liquet cases who do not present evidence, or whose evidence is inadequate, must take the risk of losing their case, gradually permeated through both academic and legal practice circles. Following this, concepts such as “absolute substantive truth” and “complete alignment of subjective recognition with past objective facts” were eventually left behind, while “legal truth” and “procedural truth” were emphasized in their place. Furthermore, throughout that process, the slogan borrowed from abroad of “procedural justice” also assumed a major role and for a time it was the catchphrase of the civil litigation academic community. Today it can be counted as one of the basic legal concepts which are firmly fixed in Chinese law.



Similarly, one more dynamic process which began with the reform towards “strengthening the onus of proof” is linked to the impact on the litigation structure. When judges receive a claim, in the conventional trial process which consists of immediately going to the place of the dispute and investigating facts and collecting evidence, for example by way of broad ranging interviews, the collection of evidence and formulating the investigation and evaluation of evidence are liable to become integrated with one another in a single trial structure. However, the division of stages in the litigation trial has already been encapsulated by the division of roles, putting the burden of collecting evidence onto the parties and of carrying out the investigation onto the courts after they have the evidence presented. Because in mediation centered practices the judge engages in the investigation of the facts and collection of evidence, and at the same time consistently approaches and persuades the parties using the resources gathered, there is therefore little necessity to convene the court. Moreover, since the “substantive” pleadings have been performed, an “opening of the court” session is generally nothing more than a formality. In contrast, by putting the “onus of proof” onto the parties, theoretically the parties need to approach the judge with their evidence and arguments and with the increasing decision rate, there is also an increasing necessity to convene trials. Following this trend, there is a possibility that the “opening session” becomes an independent stage in litigation as the more appropriate “location” for these approaches to be made. The trial system reform process that started with the “strengthening of the onus of proof” will soon become associated with the slogan of “trial centered in public courts” and the motivation for reform that was grounded in improving efficiency also transformed into acquiring new legitimacy by making “opening sessions” substantive. In this process also, the rules of the “*öffentlichkeit*” (doctrine of public disclosure), the “*Verhandlungsmaxime*” (doctrine of oral arguments) and “*Unmittelbarkeitsgrundsatz*” (direct, face to face dealings) which were brought in from foreign countries, as well as the concept of “due process”, had a major influence and offered a foundation for legitimacy from the new angle of procedural security of the parties in public trials.



There has therefore lately been encouragement received from the movement of recent years towards an Anglo-American trial structure and civil litigation pre-trial procedures from Germany, Japan among other countries. The Chinese civil litigation academic community has also prepared pre-trial procedures and this, combined with more productive trial opening sessions, has continued to bring about consensus on realizing the so-called two-stage court structure. On the institutional side, the Supreme Court of the People's Republic of China issued civil litigation rules called the "minor provisions on evidence in civil litigation" in December 2001 and stated that from April 1 of the following year they would formally implement the content of these provisions.¹² These rules, as stated above, contain provisions which prohibit judicial inquisition in principle and which establish "legal truth" in the place of "absolute substantive truth". Additionally, with regards to court structure, these rules aim for broad productivity in pre-trial procedures and hammer out a system of "time limits to produce evidence" which can lead to the forfeiting of rights. Hence, the division of stages of the trial process into the "opening of the trial" and the "pre-opening of the trial" become substantive and expanded and are crystallized systematically. With regards to the procedures in preparation for opening the trial and their effect, the above litigation regulations are largely bound to the following rule. That is, by Article 33 of the regulations, when the court receives a case and serves the complaint and other documents, both parties must be sent a "notice of evidence" which includes a time limit of no less than 30 days to present evidence, and provides that both parties may decide the time limit on consultation. Articles 34 to 40 determine various particulars and procedures including: the effect of the loss of a right by evidence being rejected where it is presented after the time limit has passed as a method of offense/defense; the principle that changes to a claim and the filing of cross claims must be done within a time limit; a motion by a party to extend the time limit for evidence and the conditions to do so; and the relationship between the session for pre-trial evidence exchange between the parties and the time limit for producing evidence. The "exchange of evidence" comes from pretrial discovery in American civil litigation and is an attempt at trial system reform which has already taken place

¹² See The Note of the Supreme Court of People Republic of China, Number 1,2005. (中華人民共和國最高人民法院公報2005年第一号)



in one session of the courts. This is not a formal trial opening but rather both parties gather at the court or some other location and a session is conducted to exchange various information held by the parties, in front of the judge and court officers. In this attempt, as well as helping with the evidence collection by the parties, and facilitating settlement, as a pre-trial procedure it is expected to have the function of determining what issues are in dispute and consolidating evidence. The next litigation rules will systemize and put this attempt into statutory form, and will regulate various matters including the following: the exchange of evidence being performed by means of an application of the parties or the authority of the court; when the court arranges such sessions, that day, in other words, will become the time limit for the presentation of evidence; and that in principle the evidence exchange will be limited to two sessions. As is implied from this content, the composition of the litigation trial process which has arisen from this, the parties put out all the arguments and evidence they can before the trial so that when the formally court opens, the presentation of new arguments and evidence are essentially precluded by the loss of a right and the majority of cases can be concluded in one trial opening session. This composition is clearly similar to the two-stage trial structure which forms the basis of civil litigation in America, or lately also in Germany and Japan. It goes without saying that these reform attempts in pursuit of this structure as well as the process of planning the next litigation rules have exposed the courts of the People's Republic of China to civil litigation comparative law information from foreign countries such as the United States and Japan and continues to deliver this influence.

The changes to the institutional framework surrounding the trial structure in Chinese civil litigation, were not simply an approach toward division of the trial stages, such as the division of "trial" and "pretrial" in Anglo-American law, or the division of "procedures to consolidate the issues in dispute" and "the day to present the main oral submissions" in German and Japanese law. Rather, the changes were, more importantly, deeply related to a shift in the basic philosophies and values of litigation and the courts. In other words, civil litigation in China until now has had the "courts versus the parties" structure as its foundation while the judge's judicial inquisition and persuasion or education of the parties, and so on, were



driven by the court's initiative. However, throughout "trial system reform", the pursuit of litigation has shifted the emphasis to the expansion of the offensive and defensive elements between the parties and after the change of the basic structure of procedural development to "plaintiff versus defendant" the adjustment of procedural regulations regarding the litigating behavior of each party gradually became a practical concern. The regulations regarding the "time limit for evidence" and "exchange of evidence" seen in the litigation rules produced by the Supreme Court, encourages the strengthening of vigorous, early-stage presentation of evidence by the parties and attempts to actualize a productive offense/defense becomes clear, and are simply rules to give shape to the adjustment of the offensive and defensive elements between the parties. For the courts also, the deployment of these rules demands the performance of strict self-responsibility, premised by the establishment of the parties' independence, in other words, showing the existence of an all-out adversarial mind-set. Based on what has taken place up until this point, we can say that the procedural rules of Chinese civil litigation have recently come to the point of totally adopting the mindset of the basic philosophies and foundations which exist in the background to Western-style civil litigation.¹³

Part 4: The complicated phenomenon of foreign legal influence

As we have seen above, the influence of foreign law in China is not simply a case of academically introducing comparative legal learning, to then instantly spread to legal practice. Rather, it spreads gradually via a kind of internal logic, under the constraints of the general conditions of society and selectively received in response to the practical demands of the time and place. During this process, a wide variety of elements interacted with each other, such as promoting reform toward adversarialism on the practical level, the expansion of comparative legal studies on the academic level and the change in general social circumstances such as the

¹³ These basic philosophies and mindsets are thought to be common to both Continental European law and Anglo-American law. For an attempt at developing a theoretical model which takes into consideration the adversarial relationship of the parties, and the elements of self-selection and self-responsibility, underlying civil litigation in the West, see: Yaxin Wang, A Model of Civil Procedure's Basic Structure, Taipei: Cross-Strait Law Review, 3. 2003 (王亞新、關於民事訴訟基本構造的一個理論模型、台北：月旦民商法雜誌2003年第三號).



development of the market economy, and produced a complicated and dynamic modality. At present, from the founding philosophies and thoughts held in common with Western civil litigation as the starting point, basic philosophies and theories or a part of the technical procedural framework have become settled in Chinese civil litigation and this influence is now exercised in a stable way. However at the same time, if the rules regarding civil litigation from foreign countries are “imported” into an environment which has a radically different system and doctrine, naturally it is not possible to maintain the original shape and form of those rules as they cannot be exercised in the same role as they had in the origin country. In particular, if we consider elements such as the fact of China’s massive geographical area and huge population, and moreover the developmental inequalities and differences which stand out between cities and rural communities and the geographical areas of the relatively economically advanced east coast compared with the lagging central-west areas, the Chinese civil litigation academic community has still not become a single combined “legal community”. It is therefore not difficult to understand that the attempts in litigation practice and procedural reform in the courts of the People’s Republic of China are varied over different regions. Under these circumstances, the influence from foreign law is not omnipresent in a simple form in Chinese civil litigation, but rather we must say that at present it is a very complicated phenomenon.

What I must point out from the outset is that the part of the system which has taken on foreign legal influence in its procedural laws is not necessarily being utilized in practice. One example of this, as touched on before, is the “represented litigation for an undetermined number of parties” which was newly created by the civil litigation laws in 1991, and learned from American “class actions”. Even though it has been more than ten years since Article 55 put this system into place, there are scant cases where this article has been applied and on the practical side there is even a sense that its application is avoided as much as possible.¹⁴ The elements which affect or regulate these circumstances are extremely complicated and indicate

¹⁴ There are still no results of systematic or empirical investigation into the circumstances of the operation of the system or its causes, however there are numerous materials on the state of affairs. For example, a certain author pointed out that “the articles regarding represented litigation for an undetermined number of parties are mostly empty text”: Yu Fan, edit, *Group Litigation: About its Problems of System and Practice*, Beijing: Pekin University Press, 2005.361. (範愉編著、集團訴訟問題研究、361頁,) as cited above.



many things, however it is perhaps the following situation which forms the most basic factor. As opposed to the “class action” procedure in American civil litigation by giving an incentive to the institutional means and to those mobilized for a number of dispersed parties to come together to form a group or association, it appears that presently in China, in litigation practice it is often judged to be certainly not in the best interests for a large number of parties legally mobilized or associated where the scope and number of litigants is not defined, since social stability is given considerable emphasis. Ultimately, in most cases where the application of the article on representative litigation in which the number of litigants is undefined, the practical norm is to deal with claims by dividing them up and dealing with them separately, only consolidating them at the trial stage.

Furthermore, it is difficult to say that the procedures introduced from continental civil litigation laws are being sufficiently utilized. For example, *Mahnverfahren* (summary procedure) is the system utilized more than civil litigation ordinary procedures in Germany, France and Japan. However, in contrast to these countries, since these *Mahnverfahren* were introduced in China in 1991 by the current civil litigation law, summary proceedings are applied in only a small number of cases by comparison with the number of ordinary procedures received each year.¹⁵ The causes of this problem have not been systematically investigated, however there are normally two explanations which are argued as generally indicative factors.¹⁶ One is the explanation that from the point of view of institutional design, when parties use summary proceedings make a claim for a payment of a debt, their opponent normally institutes a direct notice of opposition. As the court is unable to make a substantive investigation of this, the case can only be aborted, and hence summary proceedings are rarely used because they become an inefficient and work intensive system in which the applicant has no choice but to make an amended claim. One further explanation is that, taking into account the court’s financial

¹⁵ Chinese justice statistics do not include summary proceedings and no systematic data exists. According to fragmentary media coverage, in one section of the courts of the People’s Republic, the summary proceeding matters processed per annum seems to only be a small percentage of the ordinary procedures matters. See: Wusheng Zhang, *The Study on summary procedure*, Beijing: Chinese People University Press, 2002 172. (章武生、民事簡易程序研究、北京：中国人民大学出版社、2002年、172頁.)

¹⁶ For example, see Xuezai Liu, et al, *Some Problems of summary procedure*, Lawyer World, 2001. 7. 45-46. (劉學在、胡振玲、督促程序的適用現狀及其立法完善、律師世界2001年第7號、45—46頁.)



incentives, if the court accepts an ordinary case, the litigation fee comes into the court proportionate to the litigation expenses. However, in summary proceedings the payment of fees is kept at a nominal amount, and therefore there are few merits to summary proceedings, and a lack of motivation to advance and promote its use in courts which rely financially on litigation fees. Although there is as yet no empirical research to support these explanations, I think that we must pay attention to points in each explanation and I suggest that the utilization of institutions and procedures borrowed from abroad is in fact related to many social conditions and environments which exist both inside and outside of the law.

Therefore, the basic thoughts and concepts adapted from foreign laws are already fixed in Chinese civil litigation procedures and have become a part of the institution and doctrine. However, it will be some time before they can be effectively utilized since the factors and conditions which form the necessary premise and setup for these elements are insufficient and underdeveloped. Let me explain this by way of the “onus of proof” concept discussed above. With the reception of the concept of the “onus of proof” and other basic notions into the civil litigation system, one of the more important roles of the concept was to distribute risk and the burden of the delivery and verification of arguments evenly between the parties. As I touched upon in the previous section, the concept and basic notions of the onus of proof in Chinese civil litigation come from continental European law. In continental European civil litigation, these burdens and risks are essentially distributed according to the organization requirements in each individual article in the substantive law. Doctrinally, there is “regulative theory” and “legal requisite classification theory” and both the academic conflict and practical treatment are developed surrounding substantive law and these doctrines. In other words, the division of the onus of proof is closely connected to the content of the substantive law and in one sense presupposes its related theoretical framework and doctrine. However, as is typified by the lack of civil code or general commercial code in China, the substantive law on the relationship between civil and commercial matters is still being developed. In this situation, despite the concept of the onus of proof being a major concern in the Chinese civil litigation academic community, there is almost no detailed research being conducted on the allocation of the onus



of proof in accordance with the individual laws in the substantive laws and their organizational requirements and added to this is the fact that there are almost no personnel with a detailed knowledge of both substantive and procedural laws. It is therefore difficult to say that that this legal concept sufficiently exercises its function in civil litigation in China today, despite being the quickest concept to be adopted from foreign laws and settled in the law.

On the other hand, we can also identify the phenomenon that although the institutions and procedures formed via influence from foreign laws may be used frequently in litigation practice in one region, in another region or in a different part of the courts it may be barely utilized at all. We can raise the example of the system of “time limits for evidence” through which delay tactics in the offense and defense may cause the loss of a right. In this system, the litigation contest is fought out even where it is contrary to the “substantive truth”, and moreover, by being able to legitimize the win/loss result based only upon the principles of the independence and self-responsibility of the parties, it seems to mean that “procedural justice” is replaced with “substantive justice”. It does not seem so extraneous that these philosophies and substantiated procedures are far divorced from the traditional social conventions of China. This is because in civil litigation procedures, the parties normally employ a lawyer, as expert in the law, as their representative and it is in the context of the social environment of modern advancements such as industrialization and urbanization and of large urban centers which consist of strangers. However, there are other cases in which the parties to a dispute are from expansive agricultural communities who have essentially maintained their traditional way of life, who often do not have the financial means to employ a lawyer and where they cannot comprehend the foreign specialized technical procedures and philosophies. In these cases it is hard to imagine the courts strictly applying the “time limits for evidence” regulations, or to directly impose court sanctions to take away rights for being late with the presentation of arguments and evidence.

Furthermore, despite continuing to formulate consensus between both the academic and practical spheres with regard to receiving a certain type of legal thought from foreign laws and establishing particular institutions and procedures, there are also examples where this



consensus can not be realized as a system of civil litigation due to the various problems and obstacles caused by China's specific historical traditions and current social conditions. For example, philosophies and thoughts such as *res adjudicata* and the finality of a judgment which are extremely important factors and form the bedrock of Western style civil litigation systems, have become more widely known in the spheres of Chinese civil litigation academia and practice, via comparative legal research and introduction in recent years. Under this influence, there is much criticism against the "system of directed civil trials" under the current laws, in which already confirmed judgments can be relatively easily overturned and matters can be repeatedly contested even where they have been concluded legally. Furthermore, there is also strong emphasis from Chinese scholars and legal practitioners pushing for the review of retrial procedures, heavily weighted in the finality of judgments and based on the theory of *res adjudicata* as well as on the retrial systems in continental European law. On a practical level, because the "system of directed civil trials" is becoming one of the obstacles to denying the finality of decisions, a legal arrangement between mainland China and the Special Administrative Region of Hong Kong (based on British law) to enforce those decisions made in each other's jurisdiction has yet to be reached, causing an atmosphere of frustration between the two. However, at the present, with the various proposals for reform not yet making it onto the legislative agenda due to difficult political and social challenges, and also looking forward into the near future, it will surely not be a simple matter to change the "system of directed trials" in the present civil litigation law from the ground up by following the Western style of "retrial procedures" and "review".

In one sense, the various aspects I have provided with regards to foreign legal influence are the complicated conditions and the outcome of problems directly faced by Chinese society, which is approaching a profound turning point, and the Chinese legal system in its entirety, are given from one aspect on the condition of Chinese civil litigation today. From now into the future, with China increasingly being drawn deep into globalization, China will also become more closely and more frequently engaged in exchange with other countries and will continue to be influenced from outside its borders in the area of civil litigation. However, on the other



hand, in the academic “space” in Chinese civil litigation legal scholarship, reflected in the diverse university research institutes and knowledge structures of researchers, the cooperation and exchange between researchers in pursuit of scholarship is not necessarily close-knit and the “academic sphere” is itself multi-tiered and constructed very loosely. Hence, even if there are research results into foreign laws and comparative law, these do not spread and permeate throughout the entire academic sphere. Therefore, one issue which we must research is by what processes and mechanisms can we share and accumulate knowledge. Simultaneously, because the numerous courts of the People’s Republic are distributed over wide and developmentally disproportionate geographical areas, rather than there being commonality between civil litigation and the practice of the courts, there are large sections which differ from others. In these circumstances, the systems and procedures adopted from foreign countries are not guaranteed to be applied uniformly or generally, but rather these are ruled and influenced according to the customary methods and management of each area and are used selectively. The phenomena of the occurrence of subtle differences between court practices in different geographical areas are likely to continue into the future.

The issue of foreign legal influence in the area of Chinese civil litigation must be understood against the background and phenomena of the unification and diversification of procedural law and the related academic agency in the era of globalization on a world-wide scale. Chinese civil litigation legal scholars have also come to resemble that seen in the academic spheres of Japan, Korea and Taiwan, and are increasingly “taking the view of integrated comparative legal scholars”¹⁷. However, the important issue from now on should be the full cooperation in international academic circles and participation in those discussions that take place within.

¹⁷See

谷口安平、比較民事訴訟法の課題・序説、京都大学法学部創立百周年記念論文集第三巻・民事法、東京：有斐閣、1999年、523頁。

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ADMINISTRATIVE LITIGATION IN CHINA: PARTIES AND THEIR RIGHTS AND OBLIGATIONS

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The rights and obligations of the parties involved in an administrative litigation in China are important for realizing the targets, to protect the individuals' rights and to limit the public powers set up by the Administrative Procedure Law, 1989. According to the law in China, a plaintiff refers to an individual, a legal person or other lawful organizations, whose rights have been directly affected by a defendant, viz. a public authority or its employee exercising public powers. This position has, however, experienced reformation and expansion by the Supreme People's Court's interpretation of law and the introduction of public interest litigation. A plaintiff is now guaranteed the right of access to a court, right to counsel, right to motion for conflict out, etc. These rights are to be exercised lawfully and should comply with the rules and instructions laid down by the courts. Since all the parties are equal before law, a defendant or a third person is guaranteed similar rights and also subject to similar obligations. A few differences, however, exist among them as well. In the course of this paper, I will undertake a thorough analysis of this subject to reveal the inconsistency between the norms and the reality, thereby showing that the realization of the rule of law in China still has a long way to go.

I. INTRODUCTION

The promulgation of the Administrative Procedure Law of the People's Republic of China, 1989¹ ('Administrative Procedure Law, 1989') was hailed in China as "a milestone of democratic and legal construction."² Regarding this law, the famous Chinese jurist, Professor Luo Haocai stated

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¹ Adopted by the 7th National People's Congress at its second session on April 4, 1989. It came into effect on October 1, 1990.

² Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, 51 THE CHINA JOURNAL 75 (2004).

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in an interview that “in the history of China there were not any working ‘subject or citizen v. governmental officer’ institutions. The promulgation and enforcement of the Administrative Procedure Law, 1989, however, made things thoroughly different, a brand new judicial system was hereby established to supervise the public authorities in order to ensure their compliance with the law and to guarantee the lawful interests of citizens. It is noteworthy in the legal history of China.”³ According to the statistics of the Supreme People’s Court (‘SPC’), from the day the Administrative Procedure Law, 1989 came into effect until the end of 2009, courts of first instance at all levels have handled 1.52 million cases of which the private party has won in more than 30 percent of the cases.⁴

This seems to be true to some extent. The contribution of the Administrative Procedure Law, 1989 to the modernization of China especially in relation to the protection of human rights, however, is still modest. One who makes a deeper and wider investigation is bound to be surprised by the defects in the Administrative Procedure Law, 1989 and would conclude that it is being ignored by both the local courts and the executive functionaries. In a similar attempt that was aimed at guaranteeing the lawful interests of the individual, juristic persons and any other organization, the State Liability Law of the People’s Republic of China, 1994⁵ (the State Liability Law, 1994) was introduced. The last 15 years, however, bear witness to its ineffectiveness in protecting the human rights of individuals; the State has only paid about RMB 50 million Yuan for the losses and injuries caused over the last 15 years and only a few victims were paid in time.⁶ Therefore it has been nicknamed by most lawyers and scholars as the “State Compensation?-No way!” law. This may be significant in order to understand the legal reality in China. For these reasons, scholars and lawyers have been crying hoarse over amending the Administrative Procedure Law, 1989. Their criticisms target not only the procedural provisions, but also, *inter alia*, the jurisdiction of the people’s courts and the scope of the rights and obligations of the parties.

³ ZHANG Wei, *1.5 Million Cases to Promote Legal Construction in China: On the 20th Anniversary of the Promulgation of the Administrative Procedure Law*, LEGAL DAILY, September 30, 2010; LUO Haocai, *Development of Administrative Litigation System with Chinese Characteristics*, 3 ADMINISTRATIVE LAW REVIEW 6 (2009).

⁴ ZHANG Wei, *id.*

⁵ Adopted by the Standing Committee of the 8th National People’s Congress at its 7th session on May 12, 1994 and came into effect on January 1, 1995, and amended by the Standing Committee of the 11th National People’s Congress at its 14th session. The amendments will come into effect on December 1, 2010. It is necessary to point out that the official translation for the title of the Law is “the Law on State Compensation of the People’s Republic of China.” It may, however, lead to some misunderstandings since the word “compensation” has various interpretations. I tend to use ‘the State Liability Law’ here since the law is similar to the *Staatshaftungsrecht* in Germany.

⁶ LI Xiujiang LI Ya’nan, *The New State Liability Law is Far From Being Perfect*, XIAOKANG, July 15, 2010, available at <http://xkzz.chinaxiaokang.com/xkzz3/newsview.asp?id=4318> (Last visited on June 15, 2011). To read this as evidence indicating the good performance of the public authorities and their civil servants is to ignore the reality in China.

This study will focus on the scope of the parties' rights and obligations in China. In Part I, I will briefly introduce the scope of the plaintiff, defendant and third party; in Part II, I will proceed to discuss the rights and obligations of the plaintiff; in Part III, the rights and obligation of the defendant will be analyzed, and finally, in Part IV, the rights and obligations of the third party will be discussed.

II. PARTIES IN ADMINISTRATIVE LITIGATION

A. PLAINTIFF

1. General Introduction

The scope of the plaintiff in administrative procedure is defined by §§2 and 24(1) of the Administrative Procedure Law, 1989 and §12 of the SPC's Some Explanations on the Application of the Administrative Procedure Law of the People's Republic of China by the Supreme People's Court, 2000, and the SPC's Explanations on the Administrative Procedure Law, 2000. According to these provisions, the plaintiff is a private party, a citizen, a legal person or an organization, who alleges that his lawful interests⁷ are violated by a specific administrative act undertaken by a public authority and its civil servants or who has certain legal interests in a particular administrative act, and hence files a suit before a people's court. This, however, should not be read to mean that only a Chinese citizen, legal person, or organization is entitled to the right to file administrative suits. The Constitution of the People's Republic of China, 1982 ('the Constitution, 1982'), also guarantees the legal interests of foreign citizens,⁸ and enterprises and industries⁹ in China. Therefore foreigners, foreign legal persons, and organizations in China as well as stateless persons could also be applicants in case their rights are violated by a specific administrative act undertaken by a public authority and its civil servants.¹⁰ In fact, they enjoy the same rights and incur the same obligations as the Chinese citizen.¹¹ The only exception to this situation is where a Chinese citizen, legal person or any other organization's litigation rights are restricted by the government or the laws of the plaintiff's homeland in respect of which the principle of reciprocity is applicable.¹²

⁷ The term "lawful interests" has always been criticized since it implies some kind of presumption of illegality in a rule of law state, which is apparently in conflict with the distribution of burden of proof. This inversion of burden of proof has been established by the Administrative Procedure Law, 1989 itself.

⁸ The Constitution, 1982, Art. 32(1).

⁹ The Constitution, 1982, Art. 18.

¹⁰ The Administrative Procedure Law, 1989, §70; ADMINISTRATIVE LAW & ADMINISTRATIVE PROCEDURE LAW 334 (JIANG Ming'an ed., 1999) ('JIANG Ming'an').

¹¹ §71(1), *id.*

¹² §71(2), *id.*

The requirement of standing in the Administrative Procedure Law, 1989 is similar to that in German law. In most cases, the plaintiffs are the private parties involved in an administrative legal relationship. In other words, they are those persons whose rights have been directly affected or infringed by an administrative action or omission.¹³ In case a victim (the qualified plaintiff) dies before he is able to carry out a suit or at any time during the litigation before the closing of the oral defense, however, his right is then shifted to his close relations, listed in the order of spouse, parents, children, sisters and brothers, grandparents, grandparents-in-law, then grandchildren, and grandchildren-in-law,¹⁴ who may carry out or continue such a suit.¹⁵ It was soon found that the scope of possible substitutes was limited, and as a result, “other close relations that have relations of fostering, supporting and maintaining with the plaintiff” was added.¹⁶ But the term “other close relations” might lead to some misunderstanding due to its inconsistency with the traditional understanding of “close relations”, either as a kindred relation or a relation formed through marriage. In this regard, it is necessary to point out that such a relation may be formed regardless of kindred or marital relations.

Similarly, the SPC has further concretized the scope of the plaintiff as a legal person or any other organization through §§14, 15, 17 and 18 of the SPC’s Explanations on the Administrative Procedure Law, 2000. For the purpose of protecting an individual’s right to property, it extends the scope of the plaintiff to cover the following individuals, legal persons and other organizations:

- (1) A partnership enterprise may file a suit on its own behalf and be represented by the executive partner. In case of other partnership organizations which are not enterprises, all the partners could act as co-plaintiffs.¹⁷ The primary organizers may represent other organizations that are not legal persons or partnerships. In case there are no such persons, it may be represented by one who has been so elected.¹⁸
- (2) Each party of a joint enterprise may file a suit on its own behalf.¹⁹
- (3) In case a private enterprise is deregistered, abolished, merged or acquired mandatorily, sold, divided or of which the membership is

¹³ Comparing M.P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE, 214 (2001) with §§2 and 24 (1) of Administrative Procedure Law, 1989.

¹⁴ The SPC’s Explanations on the Administrative Procedure Law, 2000, § 11.

¹⁵ The Administrative Procedure Law, 1989, §24.

¹⁶ The SPC’s Explanations on the Administrative Procedure Law, 2000, § 11(1).

¹⁷ *Id.*, §14 (1).

¹⁸ *Id.*, §14 (2).

¹⁹ *Id.*, §15.

changed, the enterprise or its legal representative may file a suit on its behalf.²⁰

- (4) The shareholders' meeting, the representatives of shareholders' meeting and the Board may file a suit on behalf of a Corporation Incorporated.²¹

2. Special Consideration: Public Interest Litigation ('PIL')

It is noteworthy that recently in the field of environmental protection, the standing of the plaintiff in civil litigation has been enlarged by the introduction of the PIL. In 2009, some courts in Zhejiang Province and Yun'nan Province granted leave to the All-China Environmental Protection Federation, which did not have either direct or reflective interest in an environmental case, to file a suit against the polluting industries and companies.²² It is expected that in the near future, the standing of the plaintiff in an administrative litigation will also be extended to entitle a citizen, legal person or any other organization to file a PIL against the abuse of powers by the public authorities.

B. DEFENDANT

1. General Introduction

§25 of Administrative Procedure Law, 1989 provides that the following organs could be defendants before a court:

- (1) An administrative organ that undertook the specific administrative act, in case that a citizen, a legal person or any other organization, brings a suit directly before a people's court;
- (2) An administrative organ that initially undertook the act, in case that the organ that conducted the reconsideration sustains the original specific administrative act;
- (3) An administrative organ which conducted the reconsideration, if it has amended the original specific administrative act;
- (4) Administrative organs that have jointly undertaken the act, if two or more administrative organs have undertaken the same specific administrative act;

²⁰ *Id.*, §17.

²¹ *Id.*, §18.

²² QIE Jianrong, *First Leave to Public Interest Litigation of Environmental Case Granted by Wu-xi Court*, LEGAL DAILY, July 9, 2009; *Special Government Foundation Established by Kunming City Against Environmental Pollution*, LEGAL DAILY, September 22, 2010.

- (5) An organization that is authorized to undertake a specific administrative act by the law or administrative regulations or an entrusting organ, in case a specific administrative act has been undertaken by an organization as entrusted by the organ; and
- (6) An administrative organ that exercises the functions and powers of an abolished organ, in case the administrative organ has been abolished.

In 2000, §25(4) of the Administrative Procedure Law, 1989 was amended by §§20 and 21 of the SPC's Explanations on the Administrative Procedure Law, 2000 that inserted the word "decree" into the phrase "administrative regulation, law". As a result, the scope of the defendant was expanded and the internal organs, agencies or representative organs, as well as other organizations that carry out a specific administrative act without the authorization of the law or administrative regulation but with the authorization of a departmental or local decree could be taken to court. Before the amendment, the appropriate defendant in such a case would have been the maker of the decree, or in other words, either the departments or the department-like organs of the State Council, the provincial governments or the government of the municipality directly under the Central Government, the provincial capital governments, the special economic zones government or the governments of the so-called "Bigger City" approved by the Central Government.²³

2. Special Considerations

a. Could the State Council be sued?

The answer to this question would always be in the negative for the following reasons: Firstly, unlike in the West, the doctrine of checks and balances has not found a place in the polity and constitutional design of China.²⁴ If the State Council were to be sued before a court, it would be subject to a final decision made by the SPC or any other inferior people's court. This would appear to make the judiciary superior and is almost certainly constitutionally unsustainable.

Secondly, if the State Council were placed in the defendant's shoes, would the SPC or any other court be competent to handle such a dispute? The answer to this question would always be in the negative because traditionally, the Prime Ministers are the second or third senior-most members of the Standing Committee of Political Bureau of the Ruling Party while Chief Justices of the State are not even members or may only be candidates for any

²³ The Legislation Law, 2000, Part 4, Local Autonomy and Special Regulations and Decrees.

²⁴ XU Chongde, "Judicialization of Constitutional Law" *Rebutted*, 11 CHINA PEOPLE'S CONGRESS (2006).

vacancy in the Political Bureau. This would indicate that within the party hierarchy, they are inferior to the Prime Minister. In such a context, even if the Chinese Communist Party ('CCP') was to be tried in the court, a fair and just decision would not be practicable.

Thirdly, a more persuasive and formalistic argument would be that the State Council unlike other public authorities seldom performs a specific administrative act that directly affects the legal interests of a private party. The business of the State Council, in accordance with the Constitution, 1982, is to make regulations and policies that will be concretized and enforced by the lower levels of government.²⁵

Fourthly, it seems unlikely taking into account §§5 and 14 of the Administrative Reconsideration Law of the People's Republic of China, 1999²⁶ which runs as follows: "A citizen, legal person, or any other organization that refuses to accept a specific administrative act of a department under the State Council, or the people's government of a province, an autonomous region, or a municipality directly under the Central Government, shall apply for administrative reconsideration to the department under the State Council, or the people's government of the province, the autonomous region, or the municipality directly under the Central Government that undertook the specific administrative act. The applicant who refuses to accept the administrative reconsideration decision may bring a suit before a people's court, or apply to the State Council for a ruling, and the State Council shall make a final ruling according to the provisions of this Law." This provision may be read to mean that the decision by the State Council is final and hence would not be subject to judicial review.

Yet, upon considering the sections of the Administrative Reconsideration Law, 1999, §§25(4) and (5) of Administrative Procedure Law, 1989 and §§7(4) and (5) of State Liability Law, 1994, these questions still remain open. First, §14 of the Administrative Reconsideration Law, 1999 provides persons who are dissatisfied with the administrative reconsideration decision with the choice of filing a suit before a court or making a complaint to the State Council, the decision of the State Council being final and binding. The Administrative Reconsideration Law, 1999, however, does not take into consideration the possibility of an omission on the State Council's part. Therefore, what will happen if the State Council takes no action? Should the omission of the State Council be regarded as a negative decision or merely an omission in a narrow sense? If it is viewed as a negative decision, then the private party is bound by the decision. If viewed as an omission in the narrow sense, the question that may be asked would be: will §19 of the Administrative Reconsideration Law, 1999 and §22 of the SPC's Explanation on the Administrative Procedure

²⁵ The Constitution, 1982, Art. 89.

²⁶ Adopted by the Standing Committee of the 9th National People's Congress at its 9th session on April 29, 1999 and came into effect on October 1 of the same year.

Law, 2000 apply? If so, then the private party can sue either the concerned public authorities or the State Council before a court. But it should be noted that the Administrative Reconsideration Law, 1999 does not provide a time limit for the State Council to make a decision. Accordingly, such an analogy is not supported in law.

Second, the State Council could be sued as an entrusting organ according to §4 of Administrative Procedure Law, 1989. Though it is true that most of the business of the State Council is to make regulations and policies, the law does not permit the State Council to perform specific administrative acts or entrust to some organization the power to conduct specific administrative acts on its behalf. Moreover, although the State Council being the state's executive organ should only enforce laws made by the legislature, with the development of modern society, it has been increasingly assuming public powers that are not prescribed by the law.

Third, according to the State Liability Law, 1994, the State Council could also be sued before a court in case it removes some of its departments or department-like organs, which are the appropriate defendants in a case and takes over the latter's powers and functionaries. There is, however, a gap to be filled. During the transformation of China from a planned economy to a market economy, some of the departments under the State Council were removed or were scheduled to be removed, and therefore, the powers and functions thereof have perished or will perish on removal. In such a case, whom should the private party sue? The Administrative Law, 1989 provides no hints. The last sentence of §7(5) of State Liability Law, 1994, however, offers a clue. It provides that in case the powers and functionaries of an abolished organ are also abandoned, the one to abolish the organ is to act as the obligatory compensation organ. Since the confirmation of illegality of an administrative act is to some extent regarded as the basis for making a claim for state compensation, in such a case, the latter organ could also be a defendant. In other words, the State Council could be sued before a court.

b. Could the Disciplinary Commissions of CCP be sued?

Whether the disciplinary commissions of the CCP can be sued according to the Administrative Procedure Law, 1989 or the State Liability Law, 1994 is an urgent question that needs to be settled in China. For political reasons, this question is seldom seriously discussed. This problem is seriously raised with regard to the so called inner-party disciplinary regulations of

Shuang-gui or *Shuang-zhi* of the CCP. These regulations target the corruption of civil servants, especially higher officers who are members of the CCP. *Shuang-gui* or *Shuang-zhi* refers to “two specifications”, which orders a suspected party member to go to a specified place at a specified time to make explanations and confessions on certain issues. Considering the length of the term and the limitation imposed on an individual’s personal liberty, however, it is quite similar to detention or house arrest. In some cases, the so-called internal-party measures were abused and applied to common people, and sometimes, even caused death or disabilities.²⁷ Such a victim, however, is not qualified to bring a suit before a court and receive state compensation. In *WANG, Jinying v. The People’s Procuratorate of Bao-di County*, the First Mediate Court of Tianjin City ruled that: “It’s true that WANG, Jinying has been taken into custody for 8 days, from August 25 to September 1, 1997. Accordingly, his personal liberty has been infringed. The process was, however, led by the Disciplinary Commission of CCP but not the People’s Procuratorate which acted as a coordinator. While the Disciplinary Commission is an internal organization of the CCP but not a public authority defined by the Public Torts Law, therefore WANG is not entitled to a state compensation.”²⁸

The leading opinions on this topic vary greatly from the court’s “public authority” argument that denies the claim for damages on the ground that a Disciplinary Commission of CCP is not a public authority or state organ for the purposes of the Administrative Procedure Law, 1989. Most would, however, still agree with the decision of the Court. Most of the published notes or articles on the issue are unanimous on the impossibility or unsuitability of challenging the aforesaid commission in a court.²⁹ The first alternative argument for denying a victim the right to challenge the Disciplinary Commissions of CCP is not only unreasonable but also shameful. It holds that according to the party regulations, there is an absolute prohibition on imposing limitations on personal liberty or torture and hence, there is no possibility that such an infringement or violation could ever occur. It is shameful that such proponents have confused “ought to” and “is” and remain completely blind to the realities of China, especially the abuse of such powers by some party members.

The second argument that introduces the doctrine of special power relationship seems to be a little more persuasive. It is argued that there exists a special power relationship between the CCP and its members. The power to discipline a party member falls within the autonomy of the CCP and hence

²⁷ For example, LIANG Yun-cai, the former Chairman of the Board of International Trust and Investment Co., Ltd. of Hebei Province. He was beaten to death during the term of “Shuang-gui”.

²⁸ *WANG, Jinying v. The People’s Procuratorate of Baodi County*, decided on December 21, 1999 by the Mediate Court of Tianjin City.

²⁹ LI Yongzhong, *Shuang-gui: A special Organizational Measure and Investigation Approach*, 12 *DANG ZHENG GAN BU WEN ZHAI* 20 (2003); LU Weiming, *Shuang-gui and Shuang-Zhi Is Not only Legal but Also Legitimate*, 8 *CHINA REPORT* 56 (2009).

is unchallengeable.³⁰ This may be acceptable to some extent. Even assuming that the Disciplinary Commission of the CCP has the autonomy to discipline a member of the CCP, this does not mean that the Commission would have the power to limit a party member's personal liberty. Regarding the restraint of personal liberty, the Constitution, 1982 has provided a reservation in law (*Vorbehalt des Gesetzes*) and a reservation for the judge or prosecutor (*Richter- oder Rechtsanwaltsvorbehalt*). Art. 37 of Constitution, 1982 provides: "The freedom of person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited." The article was further reiterated and concretized by §§8 and 9 of Legislation Law of the People's Republic of China, 2000 (the Legislation Law, 2000).³¹

c. Public (Power) Organization or Association

According to a leading textbook on administrative law and Administrative Procedure Law, a public organization or association should also be incorporated to some extent into the concept of a subject of administrative law.³² Therefore, it would be possible for a counter-party to bring an administrative suit against it before a court. Presently, the ongoing debates focus on the nature of the sports associations, such as football or basketball associations, and industrial associations. It is well known that they do have some public functions, i.e., the power to regulate admission, disciplinary powers and the power of dismissal of a football team, a basketball team or a certain industry. The relationship between the associations and its members or potential members is a hierarchical one that is similar to an administrative law relationship. In this regard, classifying this relationship as a civil law relationship, does not serve the purpose of protecting the rights of a private party. Courts may, however, refuse to accept the case as either a civil law case or an administrative law case.

C. THIRD PARTY

A third party refers to any other citizen, legal person or any other organization who has interest in a specific administrative act under litigation and files a request to participate in the proceedings or participates in them when so notified by a court.³³ In general, the following citizens, legal persons or other

³⁰ LU Weiming, *id.*

³¹ Adopted by the 9th National People's Congress on its 3rd session on March 15, 2000 and came into effect on July 1 of the same year.

³² JIANG Ming'an, ADMINISTRATIVE LAW AND ADMINISTRATIVE PROCEDURE LAW 143 (2007).

³³ The Administrative Procedure Law, 1989, §27.

organizations may participate or be involved in an administrative litigation as a third party.³⁴

- a. In case more than one private party's interests are directly affected by a specific administrative act undertaken by a public authority, only some of the private parties may bring a suit before the court. The others may either request to participate or be notified by the court proceeding as third parties;
- b. In case a private party is dissatisfied with a public authority's decision on a civil dispute to which he is a party and hence files an administrative suit before a court, a court must notify the opposing party who does not participate in the court proceedings as a third party to do so;
- c. In case a private party is dissatisfied with a decision co-made and signed by a public authority and non-government organization (for e.g., the Consumer Protection Association) and hence files a suit against the public authority, the latter should be notified of participating in the court proceeding as a third party since it is not suitable for it to participate as a defendant; or
- d. In case there is more than one potential defendant and the plaintiff only singles out some of them as defendants, refusing to take the court's suggestion to add such persons to the list of defendants, the court may notify those who have not been added to participate as third parties.

III. RIGHTS AND OBLIGATIONS OF PLAINTIFF

A. RIGHTS OF THE PLAINTIFF

1. Right to Access the Courts

The right to access the court has been recognized as a basic human right. Art. 41(1) of the Constitution, 1982 provides that "citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary, and to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary...". It is further concretized by §3(2) of the Civil Procedure Law of the People's Republic of China, 1982 (the Civil Procedure Law, 1982)³⁵ which provides that "this Law also applies to the

³⁴ JIANG Ming'an, *supra* note 12, 341.

³⁵ Adopted by the 7th National People's Congress at its 4th session on April 9, 1991 and came into effect on the same day, further amended by the Standing Committee of the 10th National People's Congress at its 30th session on March 28, 2007 and the amendments came into effect on April 1, 2008.

administrative disputes which in accordance with the law fall within the jurisdiction of the people's courts." This right has been further recognized by the Administrative Procedure Law, 1989 and other special provisions, such as §6 of Administrative Punishment Law of the People's Republic of China, 1996,³⁶ and §7 of Administrative License Law of People's Republic of China, 2000.³⁷ On November 9, 2009 the SPC proclaimed the Supreme People's Court's Opinions on Protecting the Rights to Action of the Private Party in Administrative Litigation³⁸ requiring the courts not to reduce the administrative jurisdiction of the courts; therefore, requiring the courts to do something more than arbitrarily refusing to give leave to a private party. Instead, the courts are required to consider new cases, improve judicial attitudes and build a more just and fair environment for the private party filing an administrative litigation.

Moreover, in order to ensure the individual's right to access courts, the Measures on the Payment of Litigation Costs, 2006³⁹ notably provides a much lower fixed rate for administrative litigation compared to the rate imposed by the court for a civil litigation. §13(5) of this law provides that the litigation costs for administrative cases are as follows: a) RMB 100.00 Yuan per trademark, patent or marital case; and b) RMB 50 Yuan per other case. Such lowering of rates enables poor applicants to file suits against public authorities. Moreover, in separate state compensation litigation, payment of the fixed rate is exempted.

For some reason, however, the right to access courts is not guaranteed in practice, and sometimes even hindered. Firstly, unlike most constitutional states, no law in the mainland of China provides that a judge cannot refuse to make a decision without the prescription of a written law. Even worse, the judicial practices of the inferior courts are dominated by mechanical and dogmatic approaches. §11 of Administrative Procedure Law, 1989 has been interpreted to mean that the jurisdiction of the courts is only limited to cases in which a private party's personal or property rights are affected. Similarly, Part 2, Chapter 1 of the State Liability Law, 1994 has been read to mean that only damages related to a private party's personal or property rights are to be compensated. If, however, §11 is read with §§2 and 12 of the Administrative Procedure Law, 1989 and §§1 through 5 of the SPC's Explanation on the Administrative Procedure Law, 2000, the interpretation of the law could be quite different. It could be understood to mean that a private party is not qualified to bring a suit before the court in cases falling within the enumerated

³⁶ Adopted by the 8th National People's Congress at its 4th session on March 17, 1996 and came into effect on October 1, 1996.

³⁷ Adopted by the Standing Committee of the 10th National People's Congress at its 4th session on August 27, 2003 and came it effect on July 1, 2004.

³⁸ SPC (2009) 54. Adopted by the SPC on November 9, 2009 and came into effect on the same day.

³⁹ Adopted by the State Council at its 159th Standing Committee meeting and proclaimed on December 8, 2006 and came into effect on April 1, 2007.

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categories which the legislature has intentionally excluded from the jurisdiction of the courts. In all other cases, he would be qualified to file a suit. Therefore, the interpretation of the law being undertaken by the courts has to some extent led to the ineffectiveness of human rights protection by the law.

Besides this, the increasingly popular ‘administrative reconciliation’ is of special concern. It is believed that the introduction of administrative reconciliation as an alternative dispute resolution method may help to resolve administrative disputes and save both the individual and the public authority from a costly and time consuming judicial process.⁴⁰ It would further promote stability and harmony within society. It must, however, be pointed out that such practices have been taken advantage of to hinder the individual’s access to the court.⁴¹ Moreover, an administrative reconciliation should not be permitted during the process of an administrative litigation, i.e., from the time a court grants leave to a citizen to file a suit until the time a decision is reached. Otherwise, such a reconciliation would be *ultra vires* and hence, invalid because it is against the compulsory provision, §50 of the Administrative Procedure Law, 1989.

2. Right to Counsel

The right to counsel or to be assisted by counsel is regarded by scholars as an indispensable constituent of the right to a fair trial.⁴² In order to guarantee the individual’s right to counsel, §29 of Administrative Procedure Law, 1989 provides that: “Each party or legal representative may entrust one or two persons to represent him in litigation. A lawyer, a public organization, a near relative of the citizen bringing the suit, or a person recommended by the unit to which the citizen bringing the suit belongs or any other citizen approved by the people’s court may be entrusted as an agent *ad litem*.” As Mark Twain, however, put it, “the law is a system that protects everybody who can afford to hire a good lawyer.”⁴³ This is also true for the Chinese legal system. The price for hiring a lawyer is always too high for individuals who are poorly paid. Accordingly, a poor person may be reluctant to file a suit against the public authorities even if his/her right is infringed. The state does not provide legal aid in such cases. Though there are some legal aid organizations and associations available to individuals, few would like to be involved with a dispute against

⁴⁰ MINAMI Hiromasa, *Jurisprudence of Reconciliation in Administrative Litigation*, GLOBAL LAW REVIEW 88-89 (2001).

⁴¹ ZHANG Jisheng, *Concerning Administrative Reconciliation Should Be Put on Hold*, 23 JOURNAL OF SHANXI POLITICS AND LAW INSTITUTE FOR ADMINISTRATORS 106 (2010).

⁴² TANG Weijian, CIVIL PROCEDURE LAW: PRINCIPLES AND CASES, 91 (2006).

⁴³ The Law Office of the Southern Centre for Human Rights, *Right to Counsel*, available at, http://www.schr.org/counsel?order=field_publication_value&sort=desc. (Last visited on June 20, 2011).

the government. This is understandable as the saying goes, “To win an administrative litigation but to ruin a whole life”.⁴⁴

3. Right to Choose among Appropriate Courts

According to the first paragraph of §20 of the Administrative Procedure Law, 1989, the plaintiff’s right to choose among appropriate courts may be exercised when two or more people’s courts have jurisdiction over a suit. For example, in case the public authority has taken a decision of administrative punishment or has undertaken a compulsory measure targeting both the personal liberty and property of a private party, the latter may choose to file a suit against the public authority before the appropriate court where the plaintiff or the defendant is located.⁴⁵ To enforce this right, a challenge to the court’s jurisdiction is allowed. A plaintiff may challenge the jurisdiction of the court within 10 days after receiving a notification calling for responses to the action.⁴⁶

To guarantee the plaintiff’s right to choose among appropriate courts, to some extent, is to prevent regional protectionism. It prevents a biased court from favoring the decision of a public authority and ensures the justness and fairness of the court’s decision.

4. Right to Motion for Conflict-Out

The ancient doctrine that “no one can be judge in his own case” finds its counterpart in the traditional institution of withdrawal (or conflict-out) in China, which came into conception in the Western HAN dynasty.⁴⁷ The institution plays a role in ensuring the justness and fairness of a decision made by either by an executive branch or a court.⁴⁸ All three procedural laws have given special attention to this doctrine.⁴⁹

⁴⁴ LI Yun, *On the Abnormal Withdrawal of Administrative Case*, 142 PEOPLE’S CONGRESS STUDYING 36 (2003).

⁴⁵ The SPC’s Explanations on the Administrative Procedure Law, 2000, §9.

⁴⁶ §10, *id.* Whether a plaintiff is entitled to challenge the jurisdiction of the court is controversial. It may not be appropriate to entitle a plaintiff to such a right since to file a suit before a certain court indicates that he/she is willing to subject himself/herself to the decision of that court. It is, however, also true that most people, especially peasants, may have little knowledge of the laws and the legal system in China and hence, to deny them such a right may endanger their right to a just and fair decision. See CHEN Qinglian, *The Plaintiff in the Administrative Procedure’s Right to Challenge of Jurisdiction*, 2010 (8) KEJIAOWENHUI 197.

⁴⁷ WANG Shiwei, *Institution of Conflict-out in Civil Services in China: Historic Experiences and Its Future*, 6 CHINA SOCIAL SCIENCES 139 (1996).

⁴⁸ TANG Weijian, *supra* note 42, 115.

⁴⁹ The Administrative Procedure Law, 1989, §6; The Criminal Procedure Law, 1997, §§28-31; The Civil Procedure Law, 1991, §10.

§§47(2) and (3) of the Administrative Procedure Law, 1989 provides that if a member of the judicial personnel, a court clerk, an interpreter, an expert witness or a person who conducts inquests considers himself/herself as having an interest in the case or to be otherwise related to the case, he/she shall apply for a withdrawal. To protect the individual's rights and reinforce this provision, §47(1) of the same law further entitles the plaintiff to the right to motion for a conflict-out regardless of the will of the persons mentioned above.

5. Right to Use One's Native Spoken or Written Language

China is a unitary multinational state that is created jointly by the people of all her nationalities. All the nationalities in China are equal,⁵⁰ especially in the eyes of the law.⁵¹ In order to ensure the equality of all of her nationalities and people, to protect the lawful rights and interests of the minority nationalities, and to uphold and develop a relationship of equality, unity and mutual assistance among all the nationalities, Art. 4(4) of Constitution, 1982 provided that "all nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs." This was further reiterated by Art. 134 of the Constitution, 1982 which provides that: "Citizens of China's nationalities have the right to use their native spoken and written languages in court proceedings. The people's courts and people's procurators should provide interpretation/translation for any party to the court proceedings who is not familiar with the spoken or written languages commonly used in the locality. In an area where people of a minority nationality live in a concentrated community or where a number of nationalities live together, court hearings should be conducted in the language or languages commonly used in the locality; indictments, judgments, notices and other documents should be written, according to actual needs, in the language or languages commonly used in the locality."

§8 of Administrative Procedure Law, 1989 along with the Civil Procedural Law and the Criminal Procedural Law has further concretized the constitutional provision, 1982 as follows: "Citizens of all nationalities shall have the right to use their native spoken and written languages in administrative proceedings. In an area where people of a minority nationality live in concentrated communities or where a number of nationalities live together, the people's courts shall conduct adjudication and issue legal documents in the language or languages commonly used by the local nationalities. The people's courts shall provide interpretation for participants in proceedings who do not understand the language or languages commonly used by the local nationalities."

⁵⁰ The Constitution, 1982, Art. 4(1).

⁵¹ The Constitution, 1982, Art. 33(2).

The realization and guarantee of the right also plays an important role in promoting justice in certain areas by subjecting the court proceedings and decisions to the supervision of the local people. In this regard, it is significant that in some regions, commonly used dialects are also allowed in court proceedings, though such dialects may not be considered to fall within the concept of the so-called official languages.⁵²

6. Right to Waive, Alter or Add Claims

The right to waive, alter or add claims is also guaranteed by law. Unlike the Civil Procedure Law, 1982, however, both the Administrative Procedure Law, 1989 and the SPC's Explanation on the Administrative Procedure Law, 2000 have set more limitations on this right.

a. Right to Waive Claims

Before a court announces its judgment or order in an administrative case, if the plaintiff applies for withdrawal of the suit, or if the defendant amends its specific administrative act and, as a result, the plaintiff applies for the withdrawal of the suit, the people's court shall have the discretion to grant approval in such cases.⁵³ It has been criticized that compared with the provisions of the Civil Procedure Law, 1982, such a limitation may not seem appropriate for restricting the free will of the plaintiff. This restriction, however, is justified in view of the legal reality within China. The reason the law-makers have set such a limitation is similar to the reason for the prohibition of reconciliation in administrative litigation. They were afraid that a plaintiff could be induced, by threat or force, by the executive body to waive their claims.⁵⁴ If so, not only is the individual's right to a remedy but also the purpose of the Administrative Procedure law, 1989 in promoting the rule of law in China, endangered. In this regard, it is necessary for the court to interfere with the making of such a decision, especially in view of the doctrine of "no one should be twice harassed for the same cause" prescribed by §36 of the SPC's Explanation on the Administrative Procedure Law, 2000.

⁵² In case of the languages used by the minorities in the mainland of China, there are about 54 written languages used by 29 minor nationalities, November 19, 2004, available at http://www.edu.cn/min_zu_850/20060323/t20060323_111262.shtml. (Last visited on June 15, 2011) According to §§2 and 8 of the National Standard Spoken and Written Language Law of China, a dialect without written form (scripture) used by HAN people is not a language in the narrow sense. However, it is very interesting that Cantonese, which is not a language in the narrow sense but a dialect, is used as an official language in HK. If in the future the nation is to be united as it once was, it is out of question that Minnanese (or Taiwanese) will also be used as an official language in Taiwan or Fujian.

⁵³ The Administrative Procedure Law, 1989, §51.

⁵⁴ LIU Jin'gang, *Unsuitability of Reconciliation in Administrative Litigation Reconsidered*, 4 ADMINISTRATIVE TRIBUNE 71 (2009).

Considering the rate at which cases have been waived in administrative litigation for last few decades, however, it seems that this particular restriction does not function well enough.⁵⁵ The court in which the case is pending (a pending court) seldom rejects such an application although they are supposed to scrutinise the application before making a ruling.⁵⁶ The causes thereof are self-evident: the pending courts are unwillingly to be involved in administrative disputes, particularly when they are directly in collision with the administrative authorities, and hence, courts are eager to get rid of the hot potatoes.⁵⁷

b. Right to Alter or Add Claims

The right to alter or add claims is also limited by §45 of the SPC's Explanations on the Administrative Procedure Law, 2000. In accordance with this provision, an application to alter or add claims without appropriate reasons will always be denied by a court after a copy of the indictment (statement of charges) is delivered to the defendant. Neither the law nor the SPC's interpretation of the laws provides a detailed analysis of the term "appropriate reasons", which means that the decision to approve such an application will be left to the discretion of a pending court. The provision itself has been under serious attack for its ambiguity about the term "appropriate reasons" which seems to empower a court to reject a plaintiff's application arbitrarily.

7. Right to Production of Evidence and Oral Defense

A plaintiff's right to production of evidence and oral defense is guaranteed and protected by the Administrative Procedure Law, 1989 and the SPC's Explanations on the Administrative Procedure Law, 2000. §30 of the Administrative Procedure Law, 1989 provides that: "A lawyer who serves as an agent *ad litem* may consult materials pertaining to the case in accordance with relevant provisions, and may also investigate among and collect evidence from the organizations and citizens concerned. If the information involves state secrets or individual's privacy, he shall keep it confidential in accordance with relevant provisions of the law."

§29 of SPC's Explanations on the Administrative Procedure Law, 2000 further provides that if a plaintiff, a third party or his/her attorney(s) has obtained the clues to certain evidence but is unable to bring them to the court, or is unable to provide copies of such evidence, he may request the court to act *ex officio* and carry out the investigation and collect such evidences. This

⁵⁵ HE Haibo, *On Case Waiving in Administrative Litigation (1987-2008)*, November 30, 2010, available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=51777 (Last visited on June 15, 2011).

⁵⁶ ZHANG Xianwei, *On Judicial Review of Nol. Pros. Application in Administrative Litigation*, 3 ADMINISTRATIVE LAW REVIEW 41 (2009).

⁵⁷ *Id.*

plays an important role in the protection of the plaintiff's right to production of evidence since it is possible that the public authority could interfere with the collection of evidence by the plaintiff.

Besides these safeguards, the law also provides that, in case evidence may be destroyed, lost or is difficult to be obtained at a later stage; the plaintiff could request the people's court to preserve the evidence.⁵⁸ Taking the lack of legal consciousness among the common people in China into consideration, the law is further reinforced by providing that the people's court may also, on its own initiative, take measures to preserve such evidence to ensure a speedy, fair and just trial.

Concerning a plaintiff's right to oral defense, §30 of the Administrative Procedure Law, 1989 provides that each party in an administrative case has the right to oral defense. Naturally, a plaintiff's right to oral defense is guaranteed. To read this provision with §29 of the Administrative Procedure Law, 1989, which provides the plaintiff with the right to counsel, and §31(1) of the SPC's Explanations on the Administrative Procedure Law, 2000 which provides for the inadmissibility of unexamined evidence, it is implied that a plaintiff can either exercise the right to oral defense himself or ask lawyers to do so on his behalf.

8. Right to Cross-Examination

A plaintiff's right to cross-examination in court proceedings is also guaranteed though the law does not make a clear provision for the same. The right may be derived from §4 of the Administrative Procedure Law, 1989 which provides that "in conducting administrative proceedings, the people's courts shall base themselves on facts and take the law as the criterion", read with §§29 and 30 mentioned above. The right to cross-examination in administrative litigation specifically entitles a plaintiff to question the witnesses, expert examiners and inspectors on the defendant's side. This right plays an important role in ensuring a just and fair trial since the defendant is given the advantage of collecting evidence and getting witnesses, expert examiners and inspectors in its favor.

9. Right to Access and Correct the Documents

The right to access and correct the documents guaranteed by §30 of the Administrative Procedure Law, 1989 plays a significant role in ensuring the plaintiff's right to file a suit, build a defense and receive a fair and just decision.

⁵⁸ The Administrative Procedure Law, 1989, §36.

10. Right to Appeal and Withdraw an Appeal

In case a plaintiff is dissatisfied with the decision of the court of first instance, he has the right to file an appeal to a higher court. In case of a ruling, he should file the appeal within 15 days from the day the judgment is supposed to reach him. In case of an order, the appeal should be filed within 10 days.⁵⁹

11. Right to Apply for Compulsory Execution

Whether the plaintiff is entitled to a right to apply for compulsory execution is a little questionable. Firstly, although §§65 and 67 of the Administrative Procedure Law, 1989 provide a process for carrying out compulsory execution, these provisions are primarily concerned with situations in which the plaintiff fails to discharge his liabilities. It is true that §65(3) is also concerned with the defendant's failure to discharge its liabilities, however, a plaintiff's right to apply for compulsory execution cannot be read into §65(3) which reads: "in case a public authority fails to enforce a people's court's final rule or order, the court may undertake the following measures...". Such a provision could only be understood as empowering or authorizing the court to carry out compulsory measures against the public authority if it does not follow the ruling or order of the court but cannot be read as entitling a plaintiff to the right to apply for compulsory execution. Accordingly, although it is true that a plaintiff is not prevented from requesting the court to do so, the court is not obliged to undertake a compulsory execution in favor of the plaintiff.

It should be noted that in some situations "may" is read as "should".⁶⁰ Accordingly, though such a provision does not lay down a mandatory rule, it is not an arbitrary exercise of discretion.⁶¹ Hence, in situations which warrant compulsory execution, a court is obliged to undertake such measures regardless of whether or not a plaintiff makes an application.

Secondly, it is also worth pointing out that even if the law did provide a plaintiff with such a right, it would still be ineffective since the law does not provide a practical process to exercise the right. This point may, however, be rebutted considering the fact that no law provides for every possible situation that may arise. Moreover, in practice, the compulsory execution provision has been applied in cases against public authorities, though not as often as it should be. §§83 and 84 of the SPC's Explanations on the Administrative Procedure Law, 2000 further concretized this provision making it clear that in case a public authority fails to undertake a ruling or order of a court, an individual, legal

⁵⁹ The Administrative Procedure Law, 1989, §§42, 58.

⁶⁰ *C.f.* LIU JIANLONG, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: INDIA'S EXPERIENCES 65 (2010).

⁶¹ *Id.*

person or any other organization may request the court to undertake compulsory execution measures.⁶² In case the applicant is a natural person, the right should be exercised within one year from the time the public authority fails to fulfill its obligation; otherwise, the right should be exercised within 180 days.⁶³

B. OBLIGATIONS OF THE PLAINTIFF

1. To Exercise Litigation Rights Lawfully

A plaintiff is supposed to exercise his/her right to litigation in accordance with the law and avoid abusing them, especially when the exercise of this right may infringe upon the freedom and liberty of another citizen, legal person or organization. This is not only a legal obligation but also a fundamental obligation laid down in Art. 51 of the Constitution, 1982 that provides: "Citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens." Art. 52 further provides: "Citizens of the People's Republic of China must abide by the Constitution and the law...". This means that a plaintiff's right ends when the interests of the state, the society or the collective, or when the lawful freedoms and rights of other citizens are affected.

2. To Comply with Rules and Instructions of a Court

A plaintiff is obligated to follow the discipline and instructions of the court; otherwise, he/she may be punished. Though there is no law on contempt of court in China, §§49(1)(e) and (f) of the Administrative Procedure Law, 1989 provide that: "If a participant in the proceedings or any other person commits any of the following acts, the people's court may, according to the seriousness of his offence, reprimand him, order him to sign a statement of repentance or impose upon him a fine of not more than 1,000 Yuan or detain him for not longer than 15 days; if a crime is constituted, his criminal responsibility shall be investigated:

...

(e) using violence, threats or other means to hinder the personnel of a people's court from performing their duties or disturbing the order of the work of people's court; or

(f) insulting, slandering, framing, beating or retaliating against the personnel of a people's court, participants

⁶² The SPC's Explanations on the Administrative Procedure Law, 2000, §83.

⁶³ §84, *id.*

in proceedings or personnel who assist in the execution of duties.”

3. Obligation to Comply with and Enforce a Court’s Final Decisions and Orders

A plaintiff is bound by the final decision or order made by the court and is obligated to enforce it.⁶⁴ If he or she fails to do so, the concerned public authority could either directly or *ex officio* undertake a prescribed compulsory execution measure or request the concerned court for compulsory execution.⁶⁵

It is, however, notable that in certain cases, despite the infallibility of a court’s final decision, the latter is subject to criticism, especially in cases where the independence of the court is in question. The authority of a court is therefore endangered since its final decision could be superseded either by writing letters to or visiting a higher officer. Some make complaints regardless of the latter’s position, i.e., by using the so-called letter and visit process or petition, or by motioning for a retrial.⁶⁶

IV. RIGHTS AND OBLIGATIONS OF DEFENDANT

A. RIGHTS OF THE DEFENDANT

Some of the rights enjoyed by the defendant are similar to those enjoyed by the plaintiff, such as: 1) the right to motion for conflict out;⁶⁷ 2) the right to challenge of jurisdiction;⁶⁸ 3) the right to counsel;⁶⁹ 4) the right to oral defense;⁷⁰ 5) the right to cross examination;⁷¹ 6) the right to access and correct

⁶⁴ The Administrative Procedure Law, 1989, §65(1).

⁶⁵ The Administrative Procedure Law, 1989, §65(2); The SPC’s Explanations on the Administrative Procedure Law, 2000, §83.

⁶⁶ The Administrative Procedure Law, 1989, §§62, 63; The SPC’s Explanations on the Administrative Procedure Law, 2000, §§36, 63, 73-81.

⁶⁷ The Administrative Procedure Law, 1989, §47; The SPC’s Explanations on the Administrative Procedure Law, 2000, §48.

⁶⁸ The SPC’s Explanations on the Administrative Procedure Law, 2000, §10.

⁶⁹ §29, the Administrative Procedure Law, 1989; §25, the SPC’s Explanations on the Administrative Procedure Law, 2000.

⁷⁰ The Administrative Procedure Law, 1989, §§4, 9; The SPC’s Explanations on the Administrative Procedure Law, 2000, §28.

⁷¹ The Administrative Procedure Law, 1989, §§4, 9; The SPC’s Explanations on the Administrative Procedure Law, 2000, §31.

the documents;⁷² 7) the right to appeal and to withdraw an appeal.⁷³ In addition to these rights, the defendant also has the following rights:

1. Right to Production of Evidence

The defendant's right to production of evidence is guaranteed by law. This can be derived from the right to oral defense clause,⁷⁴ and the right to equality before the law clause,⁷⁵ of the Administrative Procedure Law, 1989. Besides these clauses, §28 of the SPC's Explanations on the Administrative Procedure Law, 2000 provides that in case (1) the evidence collected before a specific administrative decision has been made, is unavailable due to *force majeure*; or (2) a plaintiff or a third party comes out with new reasons or evidence that have not been raised earlier, the defendant, with the permission of the pending court, may collect additional evidence.⁷⁶ §36 of the Administrative Procedure Law, 1989 further provides that if evidence is in danger of being destroyed, lost or may become difficult to obtain at a later stage, the defendant is entitled to the right to request the people's court to preserve the evidence.

Compared with the plaintiff's right to production of evidence, however, the defendant's right is strictly limited. Firstly, it has been provided that during litigation, the defendant is prohibited from collecting evidence from the plaintiff and the witnesses without the permission of a court.⁷⁷ Such evidence, along with the evidence obtained in violation of the due process of law, are not admissible in court.⁷⁸ This has been reiterated by the law, which provides that even evidence collected by a reconsideration organ in the process of consideration of a disputed administrative act is inadmissible.⁷⁹ Secondly, the law provides that in case a defendant does not turn all the evidence in to the lower court, any new evidence it turns in to the appellate court would become inadmissible and cannot be relied upon to repeal or alter the decisions of the lower court.⁸⁰

2. Right to Compulsory Execution

A defendant's power and right to compulsory execution is authorized by the Administrative Procedure Law, 1989 and other specific laws

⁷² The Administrative Procedure Law, 1989, §30; The SPC's Explanations on the Administrative Procedure Law, 2000, §63.

⁷³ The Administrative Procedure Law, 1989, §58; The SPC's Explanations on the Administrative Procedure Law, 2000, §63(1)(c).

⁷⁴ The Administrative Procedure Law, 1989, §9.

⁷⁵ The Administrative Procedure Law, 1989, §7.

⁷⁶ The SPC's Explanations on the Administrative Procedure Law, 2000, §28.

⁷⁷ The Administrative Procedure Law, 1989, §33.

⁷⁸ The SPC's Explanations on the Administrative Procedure Law, 2000, §30.

⁷⁹ §31(2), *id.*

⁸⁰ §31(3), *id.*

regulating the powers of the defendant. As mentioned above, in case a plaintiff fails to perform either a final decision of a court or a final administrative decision which has been sustained or confirmed by a court, a public authority may, on its own initiative, either resort to compulsory execution if authorized to do so, or make a request to the concerned court to take appropriate measures.

B. OBLIGATIONS OF THE DEFENDANT

As far as the obligations of the defendant are concerned, the following obligations of the defendant are similar to that of the plaintiff: the obligation to exercise litigation rights lawfully, the obligation to comply with the instructions of the court and the obligation to enforce the final decision of a court. In addition to these obligations, there are also other obligations of the defendant provided by the law.

1. To Respond to an Action in Time

A defendant must respond to an action in time. §43 of the Administrative Procedure Law, 1989 provides that within 10 days of receiving the copy of the bill of complaint, the defendant shall provide the people's court with the documents on the basis of which a specific administrative act has been undertaken and file a bill of defense. If the defendant fails to do so, a trial will be carried out, in accordance with §26 of the SPC's Explanations on the Administrative Procedure Law, 2000, in favor of the plaintiff.

2. To Justify Decisions with Evidences and Reasons

With regard to the distribution of the burden of proof, the legislature has made a praiseworthy provision that has been regarded as the most significant feature of the Administrative Procedure Law, 1989.⁸¹ Unlike the distribution of the burden of proof in the Civil Procedure Law, 1982 and in the Criminal Procedure Law ("he who is affirming must prove"), §32 of the Administrative Procedure Law, 1989 has inverted the burden of proof. This was reiterated and reinforced by §26 of the SPC's Explanations on the Administrative Procedure Law, 2000. Accordingly, if the defendant does not provide the people's court with the facts and the legal basis for which a specific administrative act has been undertaken and file a bill of defense within ten days of receiving the copy of the bill of complaint, the court will then presume that the facts and legal basis for the disputed administrative act does not exist and that the act is invalid. Moreover, it has also been provided that after an administrative litigation is brought before a court, the concerned public authority

⁸¹ YANG Xiejun, *Administrative Procedure of Chinese Characteristics: Developments & Challenges*, 3 NANJING UNIVERSITY LAW REVIEW 319 (2009).

is prohibited from collecting evidence from the plaintiff or any other witness without the permission of the court.

These provisions are of tremendous significance in promoting the Rule of Law in China. Firstly, most of the common civil servants, especially the ones at the local level, are not well-educated and often regard themselves not as civil servants but as rulers. Therefore, abuse of power, especially the abuse of police powers and the disregard of due process, is not unimaginable. Such provisions will to some extent force civil servants to be more deliberative before undertaking certain administrative acts. Secondly, compared with a private party, a public authority is always better equipped with the personnel, powers and resources required to collect evidences. In view of these facts, to shift most of the burden of proof on the defendant is hardly unreasonable.

3. Not to make the Same Decision as the one is denied by the Court

In case a disputed administrative act that has been undertaken by a defendant has been reversed by a court, it must not, based on the same facts and reasons, undertake a specific administrative act essentially identical with the one denied by the court.⁸²

4. To Submit to the Supervision of the People's Procuratorate

The people's procurators are state organs for legal supervision over the acts of public authorities.⁸³ The public authorities must subject itself to the supervision of the appropriate people's procurators.⁸⁴

V. RIGHTS AND OBLIGATIONS OF THIRD PARTY

The rights and obligations of a third party depend on its material status in a specific administrative law relationship. In case it is a private party, its rights and obligations are the same as that of a plaintiff; otherwise, his rights and obligations are that of a defendant, as mentioned above.

VI. CONCLUSION

To some extent, the promulgation and enforcement of the Administrative Procedure Law, 1989 has contributed towards improving rule

⁸² The Administrative Procedure Law, 1989, §55.

⁸³ The Constitution, 1982, Art. 129.

⁸⁴ The SPC's Explanations on the Administrative Procedure Law, 2000, §10.

of law and protecting human rights in China. The effectiveness of the law in controlling public powers and protecting human rights, however, is still modest. The causes, as I have already discussed above, are as follows: Firstly, the judiciary is not independent. Independence is not only an essential feature of a constitutional state and an essential element of rule of law but also a guarantee for an effective judicial system as well. The Constitution, 1982 and the three procedural laws have clearly specified that the courts exercise their trial powers independent of any interference from administrative organs, social organizations and individuals. In practice, the courts are vulnerable to and sometimes even dominated by such interference. For example, the actions of the CCP commissions in the courts and the so called CCP commissions for politics are outside the court's jurisdiction, though most of its members are not lawyers but instead administrative officers. These commissions have to a large extent ruined the independence of the courts, though they are not supposed to interfere with the judicial process. In this regard, it is necessary to guarantee the financial and personal independence of the courts and the judges.

Secondly, the mechanical dogmatic approach adopted by most judges has also hindered the development of the law and the protection of human rights in China. Such a tendency could be the result of poor education of the judges. Only forty percent of all the judges have finished their higher education and won diplomas.⁸⁵ If the so called diplomas from party colleges, part-time colleges and correspondence courses are excluded, the number of the judges with B.A. degrees would be even less.⁸⁶ Hence, improvement of the education level of the judges is of utmost concern. Besides this effort, it seems that the early retirement of those judges who are neither sufficiently educated nor trained for judicial practice could also provide a solution.

Finally, as already mentioned, the Administrative Procedure Law, 1989 came into force around twenty years ago. For the last two decades, great changes have been taking place the world over, especially in a country like China which has witnessed fast-paced development and growth over the last few years. Some of the provisions of Administrative Procedure Law, 1989 seem to be out of tune with the demands of contemporary society and need to be amended. This is also important in keeping the law alive.

⁸⁵ ZHANG Zhiming, *On Retirement of Judges*, December 24, 2007, available at <http://www.chinafakao.com.cn/Article/rmht/200712/2993.html> (Last visited on June 15, 2011).

⁸⁶ *Id.*

CHINA'S NEW RULES ON EVIDENCE IN CRIMINAL TRIALS

TRANSLATION BY DUI HUA¹

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I. INTRODUCTION

On June 25, 2010, China's Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice formally published two sets of rules regarding the use of evidence in capital cases and the procedure for excluding confessions by criminal suspects that had been obtained through illegal means such as torture. First announced at the end of May, these new rules have been the subject of much discussion in recent weeks.

To make the content of these new rules available to a broader audience, Dui Hua has produced English translations of the texts, released in three separate blog posts on Dui Hua's *Human Rights Journal*, available at <http://www.duihua.org/hrjournal/evidence/evidence.htm>.

II. NOTICE FROM THE SUPREME PEOPLE'S COURT, SUPREME PEOPLE'S PROCURATORATE, MINISTRY OF PUBLIC SECURITY, MINISTRY OF STATE SECURITY, AND MINISTRY OF JUSTICE REGARDING THE ISSUE OF "RULES CONCERNING QUESTIONS ABOUT EXAMINING AND JUDGING EVIDENCE IN DEATH PENALTY CASES" AND "RULES CONCERNING QUESTIONS ABOUT EXCLUSION OF ILLEGAL EVIDENCE IN HANDLING CRIMINAL CASES"

To the Higher People's Courts, People's Procuratorates, Public Security Departments (Bureaus), State Security Departments (Bureaus), Justice Departments (Bureaus) of each province, autonomous region, and municipality; the Military Court, Military Procuratorate, and Security Department of the General Political Department of the People's Liberation Army; and the Production and Construction Corps Division of the Xinjiang Uyghur Autonomous Region Higher People's Court and the People's Procuratorate, Public Security Bureau, Justice Bureau, and Prison Management Bureau of the Xinjiang Production and Construction Corps:

In order to further perfect our nation's criminal procedure system and in accordance with the central government's

general plan for deepening reform of legal institutions and work mechanisms, the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice have recently, following extensive investigation and research, jointly established "Rules Concerning Questions About Examining and Judging Evidence in Death Penalty Cases" and "Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases" (hereafter the "two sets of rules"), which we hereby issue to you and request compliance and implementation.

So that the two sets of rules may be stringently and thoroughly implemented in the course of executing the law, we hereby issue the following opinions:

A. *Fully Recognize the Enormous Significance of the Establishment and Implementation of the Two Sets of Rules*

The two sets of rules set higher standards and stricter demands on law enforcement organs' handling of criminal cases, especially death penalty cases. As such, they are extremely significant for the perfection of our nation's criminal procedure system, increasing the quality of law enforcement and handling cases, and promoting socialist rule of law construction. The central government places a high priority on these two sets of rules, and Comrade Zhou Yongkang, member of the CPC Politburo member and secretary of the Central Politics and Law Committee, led a full session of the Central Politics and Law Committee that also served as a briefing on reform of the legal system [at which] serious discussions of the two sets of rules [took place]. He called on people's courts, people's procuratorates, public security organs, state security organs, and judicial administration organs at all levels to carry out their duties in accordance with the law; strictly implement the two sets of rules; pay attention to facts, evidence, the law, and responsibilities; guarantee quality in handling cases; punish crime, protect human rights, and uphold justice in accordance with the law; and ensure that each criminal case handled can withstand scrutiny of the law and history. Relevant organs in each province, autonomous region, and municipality must implement national laws fully and correctly, carry out the criminal justice policies of the Party and state at a high level, and actively increase publicity work in order to give full recogni-

tion to the enormous significance of adopting the two sets of rules.

B. *Resolutely Arrange and Begin Training for the Two Sets of Rules*

People's courts, people's procuratorates, public security organs, state security organs, and judicial administration organs should seriously and immediately begin training and study of the two sets of rules, taking practical circumstances into consideration and employing different channels and methods. Care must be taken to arrange specialized training sessions for relevant personnel in order to ensure that each person involved in handling criminal cases fully grasps the details of the two sets of rules.

C. *Stringently and Thoroughly Implement the Two Sets of Rules*

These two sets of rules not only fully set out the fundamental principles for evidence in criminal procedure and detail standards of proof; they also further specify with respect to the collection, fixing, examination, judgment, and use of evidence. They not only establish the meaning and extended meaning of illegal evidence, but also standardize in detail the procedures and burden of proof [used] in investigating and excluding illegal evidence. Truly implementing these two sets of rules will inevitably play a major role in raising the standards of law enforcement and improving the quality of law enforcement personnel. Each unit concerned should stringently and thoroughly implement the two sets of rules in their practice of executing the law and firmly establish the equal importance of punishing crime and protecting human rights and the equal importance of substantive and procedural law. Evidence must be collected, examined, and judged fully, objectively, and in accordance with the law. Facts and evidence must be checked in order to raise the quality of criminal adjudications and ensure that the two sets of rules are implemented so that each criminal case can be handled in an ironclad manner. Summing up and reporting in a timely manner to central bodies in charge any new situations and problems encountered in the course of implementation, as well as new experiences discovered, must be resolute.

Finally, “Rules Concerning Questions About Examining and Judging Evidence in Death Penalty Cases” may be used as a reference for implementation in handling other criminal cases.

Supreme People’s Court, Supreme People’s Procuratorate,
Ministry of Public Security, Ministry of State Security,
Ministry of Justice
June 13, 2010

III. RULES CONCERNING QUESTIONS ABOUT EXCLUSION OF ILLEGAL EVIDENCE IN HANDLING CRIMINAL CASES

In order to standardize legal practices and promote fairness in the execution of the law, these rules are established in accordance with the Criminal Procedure Law and relevant judicial interpretations and in combination with the actual work of the people’s courts, people’s procuratorates, public security organs, state security organs, and judicial administration organs in handling criminal cases.

Article 1: The category of illegal oral evidence includes statements by criminal suspects or defendants obtained through illegal means such as coerced confession as well as witness testimony or victim statements obtained through illegal means such as use of violence or threats.

Article 2: Oral evidence that has been determined to be illegal in accordance with the law shall be excluded and may not serve as the basis for conviction.

Article 3: In the course of examining whether to approve arrest or initiate prosecution, the people’s procuratorates shall exclude illegal oral evidence in accordance with the law and may not use it as the basis for approving arrest or initiating prosecution.

Article 4: If, between the time that a copy of the indictment has been delivered and the time the trial commences, a defendant alleges that his or her pretrial confession was obtained illegally, he or she should submit a written motion to the people’s court. If the defendant has real difficulties with writing, he or she may make the accusation orally to be recorded by a people’s court employee or the defendant’s defense counsel, a

copy of which the defendant shall sign or affix with his or her thumbprint.

The people's court shall deliver a copy of the defendant's written motion or record of accusation to the people's procuratorate prior to the commencement of the trial.

Article 5: If, prior to commencement of the trial or during the trial, a defendant or his or her defense counsel alleges that the defendant's pretrial confession was obtained illegally, the court should conduct an investigation in court immediately following the prosecutor's recitation of the indictment.

If, prior to the conclusion of courtroom debate, the defendant or his or her defense counsel alleges that the defendant's pretrial confession was obtained illegally, the court shall also conduct an investigation.

Article 6: If a defendant or his or her defense counsel alleges that the defendant's pretrial confession was obtained illegally, the court shall request that he or she provide relevant leads or evidence with respect to the alleged illegal obtaining of evidence, such as the person(s), time, place, manner, and content.

Article 7: If, upon investigation, the court has questions about the legality of the way the defendant's pretrial confession was obtained, the prosecutor shall provide interrogation transcripts, original audio or video recordings of the interrogation or other evidence and request that the court notify other individuals present at the interrogation or other witnesses to provide testimony before the court. If it is still not possible to eliminate suspicion of coerced confession, [the procuratorate shall] request that the court notify the interrogator(s) to provide testimony before the court and confirm that the confession was obtained legally. If the prosecutor cannot provide evidence at the time of the hearing, he or she may recommend that the court postpone the trial proceedings in accordance with Article 165 of the Criminal Procedure Law.

Having been notified in accordance with the law, interrogators or other individuals shall testify before the court.

If the prosecutor submits an officially sealed [written] explanation that has not been signed or sealed by the interrogator(s)

concerned, the document may not serve as evidence that the evidence was obtained legally.

Prosecution and defense may cross-examine evidence and carry out debate with regard to the question of whether the defendant's pretrial confession was obtained legally.

Article 8: If the court has questions about the evidence submitted by either the prosecution or defense, it may adjourn the proceedings and conduct investigation and verification of the evidence. If necessary, the court may notify the procurator or defense counsel to be present.

Article 9: If, in the course of the trial, the prosecutor recommends postponement of the trial proceedings in order to submit new evidence or conduct additional investigation, the court should agree.

If the defendant or his or her defense counsel requests [that the court] notify an interrogator, other individuals present at the time of interrogation, or other witnesses to appear in court and the court determines it to be necessary to do so, the court may announce postponement of the trial proceedings.

Article 10: Following the court's investigation, the defendant's pretrial confession may be read in court and subjected to cross-examination under one of the following circumstances:

- (1) The defendant or his or her defense counsel do not provide leads or evidence of illegally obtained evidence;
- (2) The defendant or his or her defense counsel has provided leads or evidence of illegally obtained evidence, [but] the court has no questions about the legality of the way the defendant's pretrial confession was obtained;
- (3) The prosecutor provides credible and sufficient evidence that is able to eliminate [questions about whether] the defendant's pretrial confession was obtained illegally.

A defendant's pretrial confession that is read in court should be considered together with the defendant's statement in court and other evidence before determining whether it may serve as the basis for conviction.

Article 11: If the prosecutor does not provide evidence to confirm the legality of the defendant's pretrial confession, or the evidence provided is not credible or sufficient enough, that confession may not serve as a basis for conviction.

Article 12: If a defendant or his or her defense counsel alleges that the defendant's pretrial confession was obtained illegally and the people's court of first instance does not investigate [the allegation] and uses the defendant's pretrial confession as a basis for conviction, the people's court of second instance shall conduct an investigation into whether the defendant's pretrial confession was obtained legally. If the procurator does not provide evidence to confirm [legality] or the evidence provided is not credible or sufficient enough, the defendant's confession may not be used as a basis for conviction.

Article 13: If, in the course of the trial, the procurator, the defendant, or his or her defense counsel alleges that written testimony of a witness who has not appeared in court or a written statement by a victim who has not appeared in court was obtained illegally, the party who submitted the evidence shall verify that the evidence was obtained legally.

With regard to the evidence mentioned in the preceding paragraph, the court should carry out an investigation with reference to the relevant provisions of these rules.

Article 14: If material or documentary evidence is obtained in a manner that clearly violates the law and may have an impact on the fairness of an adjudication, redress or some reasonable explanation should be made, otherwise that material or documentary evidence may not serve as a basis for conviction.

Article 15: These rules are effective from July 1, 2010.

IV. RULES CONCERNING QUESTIONS ABOUT EXAMINING AND JUDGING EVIDENCE IN DEATH PENALTY CASES

In order to handle death penalty cases, punish crime, and protect human rights with fairness and caution and in accordance with the law, these rules are established in accordance with the provisions of the Criminal Procedure Law of the PRC and other relevant legal provisions and in combination with legal practice.

A. General Provisions

Article 1: The Criminal Law and Criminal Procedure Law must be strictly implemented in handling death penalty cases in order to ensure the cases' quality and that the facts are clear, the evidence is credible and sufficient, procedures are legal, and the law is applied correctly.

Article 2: The facts used to determine guilt in a case must be based on evidence.

Article 3: [Police] investigators, procurators, and judicial officers shall stringently obey legal procedure and fully and objectively collect, examine, verify, and make determinations about evidence.

Article 4: Only evidence that has been examined and verified to be true through an investigation process in court involving presentation, identification, and cross-examination may be used as a basis for conviction and determining sentence.

Article 5: In death penalty cases, determination of the facts of the defendant's crime must be based on credible, abundant evidence.

Credible, abundant evidence means:

- (1) All of the facts used to convict and determine sentence are proven by evidence;
- (2) Each item of evidence used in conviction must have undergone a legal process [by which it is] examined and verified to be true;
- (3) There is no contradiction between items of evidence or between an item of evidence and the facts of the case, unless the contradiction can be reasonably ruled out;
- (4) In cases involving offenses committed jointly, a defendant's position and role [in the crime] have been fully examined;
- (5) The process of determining the facts of the case based on evidence comports with logic and empirical rules, and the conclusion drawn from the evidence is the only one [possible].

In handling death penalty cases, proof of each of the following facts must be based on credible, abundant evidence:

- (1) [Whether] the crime charged was committed;

- (2) [Whether] a defendant committed the criminal act and the time, place, manner, consequence, and other details of the criminal act committed by that defendant;
- (3) Circumstances regarding a defendant's identity that have an influence on conviction;
- (4) [Whether] the defendant possesses criminal responsibility;
- (5) The defendant's culpability;
- (6) Whether the offense was committed jointly and what the defendant's position and role was in that joint offense;
- (7) Facts warranting heavier punishment for the defendant.

B. *Examination and Determination of Different Types of Evidence*

1. *Physical and Documentary Evidence*

Article 6: In examining physical or documentary evidence, emphasis shall be placed on the following:

- (1) Whether the physical evidence is the original object or the documentary evidence is the original document; whether photographs, video recordings, or replicas of physical evidence or duplicates or facsimiles of documentary evidence match the original items or documents; whether physical or documentary evidence has been identified and verified; whether photographs, video recordings, or replicas of physical evidence or duplicates or facsimiles of documentary evidence were reproduced by more than two people; whether the producer has a signed, written explanation concerning the production process and the location of the original document or item;
- (2) Whether the procedure and methods of collection for physical or documentary evidence are in compliance with the law and relevant regulations; whether physical or documentary evidence that was obtained through on-scene investigation, inspection, search, or confiscation have corresponding records or invoices; whether the records or invoices are signed by [police] investigators, the persons who possessed the items, and witnesses, and whether an ex-

planation is provided if the signature of the person who possessed the items is absent; whether the distinguishing features, number, quality, and names of the items are clearly described;

(3) Whether physical or documentary evidence was damaged or altered in the process of collection, storage, or authentication;

(4) Whether physical or documentary evidence has any relation to the facts of a case. Whether biological evidence, traces, or items left at the scene and related to the crime, such as bloodstains, fingerprints, hair samples, or bodily fluids, that satisfy the conditions for testing have undergone DNA testing, fingerprint analysis, or other testing methods, and whether they have been determined to match relevant biological samples, biological characteristics, or items from the defendant or victim;

(5) Whether all physical or documentary evidence related to the facts of a case has been collected in full.

Article 7: If any bloodstains, fingerprints, footprints, handwriting samples, hair samples, bodily fluids, human organs, or other traces or items possibly related to the facts of a case are discovered through on-scene investigation, inspection, or search and either ought to have been recovered but were not or ought to have been tested but were not, with the result being that there remain doubts about the facts of the case, the people's court shall explain the situation to the people's procuratorate, and the people's procuratorate may additionally collect or obtain evidence and produce a reasonable explanation or return the case to the investigating organ to conduct additional investigation or obtain relevant evidence.

Article 8: Physical evidence used as a basis for conviction should be the original item. Only when the original item is inconvenient to transport or difficult to preserve, or, in accordance with the law, must be kept in storage or disposed of by the relevant department or returned may a photo or video recording be shot or a replica produced that reflects the original likeness or content. A photograph, video recording, or replica of physical evidence may serve as a basis for conviction only after having been compared with the original item and found to have no errors, subjected to authentication as true, or un-

dergone some other method able to prove it to be a true [copy]. Any photograph, video recording, or replica that does not reflect the original likeness and distinguishing features of the original may not serve as a basis for conviction.

Documentary evidence used as a basis for conviction should be the original item. Duplicates or facsimiles may only be used when there is real difficulty in obtaining the original document. Duplicates or facsimiles of documentary evidence may serve as the basis for conviction only after having been compared with the original items and found to have no errors, subjected to authentication as true, or undergone some other method able to prove it to be a true [copy]. Any documentary evidence that has been altered or shows traces of alteration that cannot be reasonably explained or any duplicate or facsimile of documentary evidence that does not reflect the original document and its content may not serve as a basis for conviction.

Article 9: Any physical or documentary evidence obtained through on-site investigation, inspection, search, or confiscation that is not accompanied by a record of on-site investigation or inspection, a search record or record of requisition, or an invoice of items confiscated may not serve as a basis for conviction if its origins cannot be verified.

If there are any of the following flaws in the procedures or methods used to collect physical or documentary evidence, [the evidence in question] may be used if the relevant officer rectifies [the error] or provides a reasonable explanation:

- (1) For physical or documentary evidence that has been collected or obtained, the record of on-site investigation or inspection, search record, record of requisition, or invoice of items confiscated is not signed by the investigator, the person who possessed the items, or witness, or the distinguishing features, number, quality, or names of the items are not clearly described;
- (2) For photographs, video recordings, or replicas of physical evidence or duplicates or facsimiles of documentary evidence that have been collected or obtained, there is no notation that they have been checked against the original items and found to be identical, the time of production is not noted, or the

signature (chop) of the person (unit) from whom [the evidence] was collected or obtained is missing;

(3) Photographs, video recordings, or replicas of physical evidence or duplicates or facsimiles of documentary evidence do not have a written explanation from the person who produced them about the production process and the location of the original document or item or that explanation has not been signed.

(4) There are other flaws in the procedures or methods [used to] collect physical or documentary evidence.

If there are questions about the source of or collection procedures for physical or documentary evidence and no reasonable explanation is given, that physical or documentary evidence may not serve as a basis for conviction.

Article 10: Physical or documentary evidence that satisfies the conditions for identification should be identified by a party to the case or a witness, or, if necessary, submitted for authentication.

2. *Witness Testimony*

Article 11: In examining witness testimony, emphasis shall be placed on the following:

(1) Whether the testimony is [based on] the direct perception of the witness;

(2) Whether at the time given the testimony of the witness might be influenced by his or her age, cognitive level, capability of recollection and expression, or physiological or psychological state;

(3) Whether the witness has an interest with respect to a party in the case or the outcome of the case;

(4) Whether the testimony was obtained using procedures and methods in compliance with the law and relevant regulations; whether violence, threats, inducements, deception, or other illegal methods of obtaining evidence were used; whether there were violations of regulations requiring witnesses to be questioned individually; whether the transcript was checked for accuracy by the witness and a signature (chop) or fingerprint affixed; whether in questioning

a juvenile witness his or her legal representative was called to appear and whether the legal representative did appear or not;

(5) Whether the witness testimony corroborates other testimony or evidence or whether there are contradictions;

Article 12: Witness statements obtained through violence, threats, or other illegal means may not serve as a basis for conviction.

Testimony by witnesses who are clearly under the influence of alcohol, narcotics, or psychotropic drugs such that they cannot properly express themselves may not serve as a basis for conviction.

Witness testimony involving conjecture, opinion, or inference may not be used as evidence, except empirical judgments based on daily life that accord with the facts.

Article 13: The following kinds of witness testimony may not serve as a basis for conviction:

- (1) Testimony obtained without questioning witnesses individually;
- (2) Written testimony that was not checked for accuracy by the witness and a signature (chop) or fingerprint affixed;
- (3) Questioning of a deaf-mute or a member of an ethnic minority or foreigner who does not understand the local common vernacular or written language, when a translator should have been provided but was not.

Article 14: If there are any of the following flaws in the procedures or methods used to obtain witness testimony, [the testimony in question] may be used if the relevant officer rectifies [the error] or provides a reasonable explanation:

- (1) The [record] does not provide the name of the questioner, recorder, or legal representative or the start and stop time or place of the interview;
- (2) The location where the witness was interviewed does not comply with regulations;
- (3) The interview record does not note that the witness was told that he or she should give a truthful statement and that intentionally giving false testi-

mony or withholding evidence of a crime is punishable under the law;

(4) Interview records show that the same interviewer was interviewing a different witness at the same time.

Article 15: Under the following circumstances, the people's court should call a witness to give testimony before the court. Written testimony from a witness who has been summoned in accordance with the law but who does not testify in court may not serve as a basis for conviction if there is no way to verify it under cross examination:

(1) The people's procuratorate and the defendant and his or her defense counsel disputes the testimony of a witness and that witness testimony [will have] a major impact on conviction or sentencing;

(2) Others the people's court determines should appear in court to give testimony.

When the testimony of a witness in court contradicts his or her pretrial testimony, if the witness can provide a reasonable explanation in court for recanting his or her [earlier] testimony and there is related evidence to corroborate it, [the court] should accept the testimony given in court.

[The court] should listen to the opinions of the procurator appearing in court and the defendant and his or her defense counsel regarding the written testimony of a witness who does not appear in court and make a general determination in consideration of other evidence. If contradictions appear in the written testimony of a non-appearing witness and those contradictions cannot be ruled out and there is no corroborating evidence, [the testimony] may not serve as a basis for conviction.

Article 16: When witness testimony concerns state secrets or individual privacy, it should be kept secret.

When a witness testifies in court, the people's court may, if necessary, take protective measures such as restricting the publication of the identity of the witness, limiting questioning, shielding the face, or altering the voice.

3. *Victim Statements*

Article 17: The aforementioned provisions for witness testimony should be applied as relevant for the examination and determination of victim statements.

4. *Defendant Declarations and Defense Statements*

Article 18: In examining a defendant's declarations and defense statement, emphasis shall be placed on the following:

- (1) Whether the time and place of the interrogation and identity of the interrogator was, at the time of interrogation, in compliance with the law and relevant regulations; whether there were fewer than two investigators interrogating the defendant; whether defendants were interrogated individually;
- (2) Whether the interrogation record was produced and revised in compliance with the law and relevant regulations; whether the interrogation record noted the start and stop times and location of the interrogation; whether at the first interrogation the defendant was told of his or her procedural rights such as [the rights] to request recusal or engage a lawyer; whether the defendant checked [the interrogation record] for accuracy and affixed a signature (chop) or fingerprint; whether fewer than two interrogators signed [the interrogation record];
- (3) Whether a person proficient in sign language or a translator is present for interrogations of individuals who are deaf-mute, ethnic minorities, or foreigners; whether, in an interrogation of a juvenile accomplice, his or her legal representative was called to appear and whether or not the legal representative did appear;
- (4) Whether a defendant's declaration was obtained through illegal means such as coercing confession; if necessary, [the court] may request a defendant's medical examination records from the time of entry in the detention center;
- (5) Whether a defendant's declarations have been consistent or, if the statements have changed, whether reasons for the changes were given; whether all of the defendant's declarations and defense statements have been included in the case file; and, if all of the declarations and defense statements that ought to be in the file are not, whether an explanation has been provided;

- (6) Whether the defendant's defense statement comports with the circumstances of the case and common sense, or whether there are contradictions;
- (7) Whether the defendant's declaration and defense statement is consistent with the declarations and defense statements of co-defendants, or whether there are contradictions.

In the aforementioned situations, if the investigating organ has provided audiovisual documentation, it ought to be examined in combination [with the relevant declarations].

Article 19: If a defendant's declaration has been obtained through use of illegal means such as coercing confession, it may not serve as a basis for conviction.

Article 20: Defendant declarations may not serve as a basis for conviction under the following circumstances:

- (1) The interrogation transcript has not been checked for accuracy by the defendant and a signature (chop) or fingerprint affixed;
- (2) Interrogation of a person who is deaf-mute or does not understand the local common vernacular or written language without providing the required person proficient in sign language or a translator.

Article 21: If there are any of the following flaws in the interrogation record, it may be used if the relevant officer rectifies [the error] or provides a reasonable explanation:

- (1) The interrogation times, interrogators' names, or name of the legal representative are recorded in error or there are contradictions;
- (2) The interrogators did not sign their names;
- (3) The record of the first interrogation does not note that the person being interrogated was informed of his or her procedural rights.

Article 22: [The court] should examine a defendant's declaration and defense statement in consideration of all of the evidence submitted by the prosecution and defense as well as all of the defendant's declarations and defense statements.

If a defendant's pretrial declarations are consistent but he or she retracts the declaration during the trial proceeding without providing a reasonable explanation for the retraction or if the defense statement contradicts the totality of the the evi-

dence in the case, when the pretrial declaration is corroborated by other evidence [the court] may accept the defendant's pretrial declaration as reliable.

If a defendant has repeatedly changed his or her pretrial declaration or defense statement but admits guilt during the trial proceeding, [the court] may accept the declaration made at trial as reliable if there is other evidence that can corroborate that declaration. If a defendant has repeatedly changed his or her pretrial declaration or defense statement and does not admit guilt during the trial proceeding, without other evidence to corroborate the pretrial declaration [the court] may not accept the declaration made at trial as reliable.

5. *Expert Opinions*

Article 23: In examining expert opinions, emphasis shall be placed on the following:

- (1) Whether the expert should have recused himself or herself but did not;
- (2) Whether the expert and his or her organization possess legal qualifications;
- (3) Whether the expert evaluation procedures were in compliance with the law and relevant regulations;
- (4) Whether the [processes for] sourcing, obtaining, storing, and transporting the specimen were in compliance with the law and relevant regulations; whether the record of how the evidence was obtained or the invoice of items seized is in order; whether the specimen is sufficient and reliable;
- (5) Whether the procedures, methods, and analytical process [used in] the expert evaluation satisfy the required professional inspection and evaluation procedures and techniques;
- (6) Whether the formal criteria for the expert evaluation have been satisfied; whether the explanation includes identification of the subject for evaluation, the party requesting the evaluation, the institution conducting the evaluation, the evaluation requirements, the evaluation process, the inspection methods, and the date of the certification report; whether the expert institution has affixed the appropriate chop and

the expert conducting the certification has signed [the report] and affixed a chop;

(7) Whether the expert opinion is clear;

(8) Whether the expert opinion is relevant to a fact of the case needing to be proven;

(9) Whether the expert opinion contradicts other evidence; whether the expert opinion contradicts the inspection record or relevant photographs;

(10) Whether relevant persons were notified of the expert opinion [results] in a timely manner in accordance with the law; whether the parties to the case dispute the expert opinion.

Article 24: Expert opinions may not serve as a basis for conviction under the following circumstances:

(1) The expert institution lacks the legal qualifications and capacity or the matter for certification exceeds the institution's area of expertise or capabilities;

(2) The expert lacks the legal qualifications and capacity, lacks the relevant professional technical skills or job title, or violates the regulations on recusal;

(3) There are errors in the evaluation procedures or methods;

(4) The expert opinion has no relevance to the subject needing confirmation;

(5) The subject being evaluated is not the same as the specimen or sample that was sent for inspection;

(6) The source of the specimen or sample sent for inspection is unclear or was contaminated such that it does not meet the conditions for evaluation;

(7) There are violations of specific evaluation standards;

(8) The expert report lacks a signature or chop;

(9) Other violations of relevant regulations.

If there are questions about an expert opinion, the people's court should call on the expert to give testimony in court or prepare an appropriate explanation, or it may also order additional evaluation or a new evaluation.

6. *Records of On-Site Investigation and Inspection*

Article 25: In examining records of on-site investigation and inspection, emphasis shall be placed on the following:

- (1) Whether the on-site investigation or inspection was conducted in accordance with the law; whether the record was produced in compliance with the requirements of the law and relevant regulations; whether the officers conducting the on-site investigation or inspection and witnesses signed the report or affixed their chops;
- (2) Whether the record of on-site investigation or inspection is complete, detailed, accurate, and standard in format; whether the subject, time, place, persons on the scene, scene location, and surrounding environment of an on-site investigation or inspection are recorded accurately; whether the location and characteristics of the scene, items, individuals, and corpses, as well as the process of on-site investigation or inspection are accurately recorded; whether the written description matches physical objects or drawings, video recordings, or photos; whether the manner and methods used to fix [the location] of evidence is scientific and standard; whether the crime scene, items, or traces were damaged or fabricated and whether the crime scene was in its original state; whether distinguishing features or injuries of individuals were disguised or altered;
- (3) When additional on-site investigation or inspection is carried out, whether there are contradictions with [earlier] investigations and whether reasons can be provided to explain the need for additional on-site investigation or inspection;
- (4) Whether the record of on-site investigation or inspection corroborates or contradicts other evidence, such as the defendant's declaration, the victim's statement, or the expert opinion.

Article 26: If a record of on-site investigation or inspection clearly does not comply with the law and relevant regulations and no reasonable explanation is provided, it may not be used as evidence.

If a record of on-site investigation or inspection does not list any witnesses, if the investigating officer(s) or witnesses did not sign [the record] or affix a chop, or if the investigating officer(s) violated the regulations on recusal, [the court] should consider other evidence in the case in examining the authenticity and relevance [of the record in question].

7. *Audiovisual Materials*

Article 27: In examining audiovisual materials, emphasis shall be placed on the following:

- (1) Whether the source of the audiovisual materials is legal and whether threats, inducements, or other violations of the law and relevant regulations were used against the party in the course of production;
- (2) Whether the identity of the producer or the possessor and the time, place, and conditions of production are clearly stated;
- (3) Whether [the material] is the original or, if a reproduction, how many copies there are; if the audiovisual material obtained is a reproduction, whether an explanation is provided regarding the inability to obtain the original, the process of reproduction, and the location of the original; whether the signature or chop of the reproducer and the person in possession of the original audiovisual material [has been provided];
- (4) Whether the content and production process are authentic or whether [the material] has undergone rearrangement, addition, deletion, editing or other fabrication or alteration;
- (5) Whether the content is relevant to the facts of the case.

If there are questions about audiovisual materials, an expert evaluation should be conducted.

The authenticity and relevance of audiovisual materials should be examined in consideration of other case evidence.

Article 28: Audiovisual materials may not serve as a basis for conviction under the following circumstances:

- (1) The authenticity of the audiovisual materials cannot be established following examination or expert evaluation;
- (2) There is dispute about the production of the audiovisual materials or the time, place, and manner with which they were obtained and no reasonable explanation or requisite proof can be provided.

8. *Other Provisions*

Article 29: In examining electronic evidence such as electronic mail, electronic data exchange, online chat transcripts, blogs, mobile telephone text messages, or electronic signatures or domain names, emphasis shall be placed on the following:

- (1) Whether electronic evidence stored on a storage medium such as a computer disk or CD has been submitted together with the printed version;
- (2) Whether the time, place, target, producer, production process, and equipment for the electronic evidence is clearly stated;
- (3) Whether production, storage, transfer, access, collection, and presentation [of the electronic evidence] were carried out legally and whether individuals obtaining, producing, possessing, and witnessing the evidence affixed their signature or chop;
- (4) Whether the content is authentic or whether it has undergone cutting, combination, tampering, or augmentation or other fabrication or alteration;
- (5) Whether the electronic evidence is relevant to the facts of the case.

If there are questions about electronic evidence, an expert evaluation should be conducted.

The authenticity and relevance of electronic evidence should be examined in consideration of other case evidence.

Article 30: Under the following circumstances, identification [of evidence] arranged by the investigating organ shall be carefully examined and may not serve as a basis for conviction if their authenticity cannot be verified:

- (1) The identification was not conducted under the direction of the investigating officer(s);

- (2) The person doing the identification was shown the target of identification beforehand;
- (3) Persons doing the identification did not carry out the identification process individually;
- (4) Except specifically in the identification of corpses and locations, the identification target was not placed in the midst of other targets with similar distinguishing characteristics, or the number of targets provided for identification did not comply with regulations;
- (5) The person doing the identification was clearly given a hint or there is suspicion that he or she was instructed about what to identify.

Identification results may be used as evidence under the following circumstances if the relevant officer rectifies [the error] or provides a reasonable explanation:

- (1) The identification was directed by fewer than two investigators;
- (2) The person doing the identification was not asked detailed questions about specific distinguishing characteristics of the identification target;
- (3) No standardized identification record was produced specifically to document the process and results of identification or the investigator(s), person doing the identification, or witness did not sign or affix a chop to the identification record;
- (4) The identification record is too simple, with only results and no [record of the] process;
- (5) The case file has only the identification record and no photos or video of the investigation target, so that there is no way to know whether the identification was authentic.

Article 31: In examining documents such as the investigating organ's record of how a case was solved, it should be noted whether the explanatory document is signed by the officer(s) in charge and the chop of the organ in charge affixed.

If there are questions about how a case was solved or there are questions about the basis by which suspicion of a defendant was determined to be major, additional explanation from the investigating organ shall be requested.

C. *General Examination and Use of Evidence*

Article 32: The probative force of evidence shall be examined and judged in combination with the specifics of the case, the degree of relevance between each item of evidence and the fact to be proven, and the relationship between items of evidence.

Only pieces of evidence that are intrinsically related, that together point toward a fact to be proven, and that reasonably rule out contradictions may serve as a basis for conviction.

Article 33: If no direct evidence exists to prove that a criminal act was committed by the defendant, the defendant may still be convicted if the following conditions are met:

- (1) Indirect evidence to be used as the basis for conviction has been examined and verified to be true;
- (2) Indirect evidence to be used as the basis for conviction is mutually corroborating, there are no contradictions that cannot be ruled out or questions that cannot be explained;
- (3) Indirect evidence to be used as the basis for conviction forms a complete body of proof;
- (4) The facts of the case established by the indirect evidence lead to only one conclusion and can rule out all reasonable doubt;
- (5) The reasoning with which the indirect evidence is used comports with logic and empirical judgment.

Extreme caution should be used in imposing the death penalty for a conviction based on indirect evidence.

Article 34: Deeply concealed physical or documentary evidence uncovered through a declaration or identification made by the defendant may [be used] to convict if it is corroborated by other evidence proving the fact of the crime and the possibility that the statement was based on collusion, coercion, or inducement can be ruled out.

Article 35: Physical, documentary, and other evidence collected by the investigating organ using special investigative measures in accordance with relevant regulations may serve as a basis for conviction if the court has verified it to be true.

The court shall, in accordance with the law, not reveal procedures and methods [used in] special investigative measures.

Article 36: Once the defendant has been convicted, the people's court should examine the following circumstances having an influence on sentencing, in addition to those that are specified by law:

- (1) The cause of the crime;
- (2) Whether the victim was at fault and the degree of fault and whether [the victim] was responsible for exacerbating a conflict and the degree of responsibility;
- (3) Whether the defendant's immediate family members assisted in apprehending the defendant;
- (4) The defendant's normal behavior and whether he or she has shown remorse;
- (5) Whether the victim filed an associated civil suit for compensation and whether the victim or the victim's immediate family have shown understanding toward the defendant;
- (6) Other circumstances influencing sentencing.

If there are circumstances that warrant lenient or reduced punishment as well as circumstances that warrant heavier punishment, [the court] shall consider the circumstances in their entirety in accordance with the law.

If circumstances warranting lenient or reduced punishment cannot be ruled out, extreme care should be used in imposing the death penalty.

Article 37: Evidence should be used with care in the following circumstances and accepted as reliable if other evidence can corroborate it:

- (1) Statements, testimony, or declarations made by victims, witnesses, or defendants who are physically or mentally handicapped, who have definite difficulty in understanding or expression with respect to the facts of the case but who have not [fully] lost their ability to understand and express themselves properly;
- (2) Testimony benefiting a defendant given by a witness who is a relative or having other close ties to that defendant, or testimony harmful to a defendant given by a witness having a conflict of interest with that defendant.

Article 38: If the court has questions about evidence, it may call on the appointed procurator or the defendant and his or

her defense counsel to produce additional evidence or provide an explanation. If it is necessary to conduct verification, [the court] may call a recess in order to investigate and verify evidence. If the court conducts an external investigation outside the courthouse, it may, if necessary, call on the appointed procurator and defense counsel to be present. If either the appointed procurator or the defense counsel or both parties are not present, the court's record shall become part of the case file.

The court may solicit opinions from the appointed procurator and defense counsel regarding evidence supplemented by the people's procuratorate or defense counsel or obtained through the court's external investigation and verification. If the two sides are not in agreement and one side requests that the court hold a hearing to investigate, the court shall hold a hearing.

Article 39: If a defendant and his or her defense counsel claim [that the defendant] voluntarily surrendered but the relevant organ has not established this fact, [the court] shall request that the relevant organ provide documentation or request that the relevant personnel testify and judge, in consideration of other evidence, whether [the claim of] surrender is valid.

If there is incomplete documentation to prove whether or how a defendant assisted in the apprehension of other co-defendants such that it is impossible to determine whether the defendant rendered meritorious service, [the court] shall request that the relevant organ provide documentation or request that the relevant personnel testify and judge, in consideration of other evidence, whether [the claim of] meritorious service is valid.

If a defendant reported or exposed crimes committed by another person, [the court] should examine whether or not the veracity [of the report] has been investigated; if it has not been investigated, it shall be investigated at once.

If there is incomplete documentation to prove whether the defendant is a repeat offender, [the court] shall request the relevant organ provide documentation.

Article 40: Generally, [the court] shall use household registration records as a basis of proof in examining whether a defendant was at least 18 years old at the time the crime was commit-

ted. If there is a dispute over the household registration records and investigation finds there to be valid documentation of birth or testimony from an uninterested party confirming that the defendant was not at least 18 years old, [the court] should find that the defendant was not 18 years old. If there is no household registration record or documentation of birth, [the court] shall make a general judgment based on census records, testimony from an uninterested party, or other evidence; if necessary, [the court] may conduct an investigation of skeletal age and use the results as a reference in judging the defendant's age.

When contradictions between items of evidence cannot be ruled out and there is insufficient evidence to prove that a defendant was at least 18 years old at the time the alleged crime was committed, if there is truly no way to determine [the truth, the court] may not determine that he or she was at least 18 years old.

Article 41: These rules take effect on July 1, 2010.

***Кримінальний процес та криміналістика;
судова експертиза; оперативно-розшукова діяльність***

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**THE DEVELOPMENT OF CHINESE
CRIMINAL PROCEDURE LAW**

Summary: The article is dedicated to questions of the development of criminal procedure legislation of China in modern history. The main provisions of Criminal Procedure Codes of PRC of 1979, 1996, 2012 are highlighted. Changes in the economic and social spheres of China that lead to changes in criminal procedure are pointed out. Accent is placed on the most important and controversial parts of the 2012 reform — investigative procedures and defense in criminal procedure.

Keywords: criminal procedure; criminal procedure code; legal reform; China; PRC.

Introduction. Although China was one of the world's earliest civilizations and has one of the world's oldest legal traditions, the modern history of China's criminal procedure law is relatively short. The latest major development of the area is the Criminal Procedure Code of 2012. This research is focused both on the development of Chinese criminal procedure law in general, as well as on the establishment of key innovations of each of the reforms of the Criminal Procedure Code of the People's Republic of China.

Discussions. In China today we generally begin our discussions with the Criminal Procedure Code (hereinafter CPC) of 1979. The founding of the People's Republic of China in 1949 began an

important new era in Chinese history. In its early days the People's Republic made several attempts to develop a Criminal Procedure Code. There were extensive discussions and a number of draft codes². Ultimately, however, the process of consideration was interrupted by a period of turmoil that has come to be known as the "Cultural Revolution". This period of turmoil is generally dated as 1966-76.

China emerged from the Cultural Revolution with a new group of leaders. One of the new leadership's goals was to re-establish the rule of law and create a modern legal system. Pursuit of these important goals led to the adoption of new codes in almost every important area of the law. The leading role in this enormous

¹ Professor Yue was a member of the study group that produced the discussion draft and the framework for 1996 revision of the Chinese CPC. She was also an important participant in the discussions resulting in the CPC of 2012.

² The two main drafts were made in 1957 and 1963.

undertaking fell on the Legislative Affairs Commission of the NPC (hereinafter NPC). After extensive discussion the NPC on 1 July 1979, adopted a CPC¹.

The Modern Era Begins: The Criminal Procedure Code of 1979. The 1979 CPC contained only 164 articles. When this code was drafted, China was still in the process of rebuilding its legal institutions. Because little attention was paid to the legal system during the Cultural Revolution, it was necessary to reconstruct both the legal profession and the legal academy. Because many legal scholars had been exiled to rural areas during the Cultural Revolution (so that they could be “corrected through labor”²), restarting the law schools required the restoration of many professors to their former positions. In order to restart a functioning criminal justice system the government found it necessary to revive and rebuild the role and profession of prosecutor³. Following the civil law tradition, particularly the legal system of the former Soviet Union, the 1979 Code adopted an inquisitorial model of criminal procedure. The 1979 Code created a framework for criminal procedure and some basic rights for defendants.

Great Step Forward: The CPC of 1996. The end of the Cultural Revolution brought tremendous change to the economic, social, and political life of China. The new

policy of continuous “open-up reform” greatly altered the daily life of the people and the political ideology. Although this new reform era brought significant benefits, it also had some drawbacks. Crime, for example, increased greatly [1]. Drug offenses that had largely disappeared during the Cultural Revolution because the country was closed to the outside world began to re-emerge in a big way. The new economic policies that China was now following brought in addition to economic progress new types of crime. The opening of the stock market, for example, resulted in new kinds of offenses as well as economic progress. The Supreme People’s Court and the Supreme People’s Procuratorate did a marvelous job of implementing the CPC of 1979 working out many problems and promulgating a great many rules, decisions, and judicial interpretations⁴. While fully supporting the huge task of implementing the new 1979 code, the government to its credit quickly realized that additional revisions would be needed.

In addition to the rapidly changing economic and political situation that emerged at the end of the Cultural Revolution, other factors played an important role in encouraging a revision of the CPC of 1979. One of the most important was the re-establishment of a Chinese community of legal practitioners

¹ This new code became effective on 1 January 1980.

² In pinyin, a form of Chinese that uses Western letters instead of Chinese characters, this is called “lao dong gai zao.” It has been abolished by the Standing Committee of National People’s Congress on December 28, 2013.

³ Chinese prosecutors are also known as “procurators.” The Chinese Prosecution Service is an independent agency, not a part of the Chinese Ministry of Justice. The Constitution authorizes prosecutors to prosecute most criminal cases, investigate crimes committed by civil servants, and to provide oversight throughout the legal system, including such things as police investigations, the execution of punishments, and civil proceedings.

⁴ The Standing Committee of the NPC promulgated three major decisions supplementing the CPC of 1979: (1) Decision on the Issues Related to the Verification of Capital Punishment Cases (10 June 1981); (2) Decision on Procedures Related to the Speedy Trial of Criminals who Seriously Endanger the Social Security (20 September 1983) (initiating the “Strike Hard” campaign), and (3) Supplementary Regulations on the Time Limit of Handling Criminal Cases (7 July 1984).

and scholars. In the mid-1970s when the CPC of 1979 was being developed, many of China's most respected legal scholars were still in the process of moving from the countryside (where they had been assigned to do manual labor during the Cultural Revolution) to their former professorial work. Although legal education in China resumed in 1977, few law schools existed at that time and the students who had been admitted to these schools were just beginning their studies. As law schools began to re-emerge, a few law reviews resumed the publication of scholarly articles. Around this time a few scholars and students went to other countries to study. This helped to re-introduce the study of comparative law. Although some of these developments came too late to influence the CPC of 1979, all played a major role in the discussions that followed adoption of the new code.

It was not until 1978 that the legal profession itself resumed the practice of law. In the years that followed the profession developed rapidly. Although there were only a few thousand lawyers in the whole of China at the beginning, by the end of 1996 there were 100,148 attorneys and more than 10,000 law firms. [2, p.1074] Although much of the work that these lawyers and firms did focused on economic matters, the legal profession also played an important role in the criminal justice system. In 1998, for example, Chinese lawyers defended nearly 250,000 criminal cases. In part because a

bar examination had been introduced during this period¹, the quality of legal profession began to improve. The rapid growth of law firms and the legal profession had a number of important effects. It made legal assistance more accessible to criminal defendants, played a role in encouraging change in the legal profession, and encouraged lawyers to seek to enhance their role in the criminal justice process.

Another important factor in the growing realization of the need to update the CPC of 1979 was China's increasing involvement with international developments in criminal justice. In 1988, for example, China ratified the United Nations Convention Against Torture and in 1991 China ratified the UN Convention on the Rights of Child².

All these factors led the Standing Committee of the Eighth NPC to begin to consider revising the CPC of 1979. To assist in this revision in 1993 a Legislative Affairs Working Committee in 1993 initiated a survey as to how the CPC of 1979 was being implemented. The Working Committee solicited the opinion of law enforcement, judicial, and administrative agencies, as well as legal scholars, as to whether there was a need to revise the 1979 Code. Soon thereafter the Standing Committee's Legislative Affairs Office asked the China University of Political Science and Law to draft a revision of the 1979 CPC³. By the fall of 1995, the Legislative Affairs Working Committee had prepared a "draft for comment" for an

¹ China introduced a bar examination in 1986 and used this system until 2000. In 2002, the bar examination was replaced by State Law Examination.

² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention was adopted 10 December, 1984. It came into force on 26 June, 1987. The Convention on the Rights of the Child (UNCRC) was adopted on 20 November, 1989. It came into force on 2 September, 1990.

³ The author participated in the research and drafting. The Ford Foundation assisted in financing the comparative research necessary for drafting the new law.

amended CPC¹. On December 20, 1995, the Committee presented its draft to the Standing Committee for preliminary review. Following its preliminary review, the Standing Committee invited all the relevant governmental departments to a special meeting for the purpose of discussing the revision and addressing an important set of controversial issues that had been raised. After a thorough discussion the Standing Committee presented its revision to the Fourth Session of the Eighth NPC². Many delegates made suggestions and proposed new provisions. On 17 March, 1996, the Congress adopted a collection of amendments entitled "Decision on Amending the Criminal Procedure Law of the People's Republic China". President Jiang Zemin signed the revised Code into law later that same day. The amended law became effective on 1 January, 1997.

The 1996 amendments significantly altered the CPC of 1979, increasing the previous 164 articles to 225 and making 110 changes in the law. Some of the more important changes were:

1. Establishing a principle similar to the presumption of innocence in western criminal procedure laws [3, Art.12];
2. Increasing the role of criminal defense lawyers;
3. Establishing a system of legal aid for criminal defendants who were indigent. This is perhaps the most important of the 1996 criminal procedure reforms;
4. Partially shifting the trial procedure for criminal cases from a pure inquisitorial

model to a model that includes both inquisitorial and adversarial elements;

5. Eliminating the practice of "custody for investigation"³;

6. Providing more protection for victims' rights.

1997-2011—Implementation of the 1996 Code and Other Developments.

An even more important development occurred in 2007 when the NPC amended the Lawyers Law. Because the amended version of the Lawyers Law conflicted with the CPC of 1996, the NPC suggested that the CPC be revised so as to resolve the conflict⁴.

In the period since 1996 China has continued to change rapidly. Recognizing that China has an important role to play in international society, China has signaled its willingness to accept international criminal justice standards and to abide by the rule of law. In 1997 China signed the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ and in 1998 it signed the International Covenant on Civil and Political Rights (ICCPR)⁶. Although China has not yet ratified the ICCPR, the Government has recognized the importance of ratification. The National Human Rights Action Plan (2012-15), for example, calls for actions to reform the laws, improve practice, and prepare for ratification of the ICCPR⁷.

China is a large country with an immense population. The Chinese legislature must balance the protection of human rights with the need to

¹ In pinyin, this is called "zheng qiu yi jian gao".

² The Standing Committee is an important committee of the NPC. It is generally responsible for the handling of necessary business when the NPC is not in session.

³ In pinyin, this is called "shou ong shen cha".

⁴ See, e.g., NPC, Draft Amendments to CPC, Explanatory Notes, indicating that "there are several improper problems in criminal procedure".

⁵ The Convention was adopted on 16 December 1966. It came into force 3 January 1976.

⁶ The Covenant was adopted on 16 December, 1966. It came into force on March 23, 1976.

⁷ It was published on 11 June 11 2012.

conserve the limited resources available for criminal justice. This task has often brought heated debate in the years since the 1996 Code was adopted. Among the important steps taken during this time was the creation by the law and practice of Chinese Supreme Court of a simplified procedure for handling minor offenses and prosecutions filed by private parties instead of the procurator¹. Many legal scholars and practitioners have also called for a much greater use of mediation. This has led to significant debate and quite a few pilot projects in local courts.

Recognizing that the CPC of 1996 would eventually need to be revised, the Tenth NPC in 2003 scheduled a revision for 2008. Although much preliminary work had been done by 2008, the issues under consideration proved to be controversial. This led to several postponements. In August 2011, the Legislative Affairs Committee of the NPC published draft amendments and invited public comments⁴. This was the first time in its history that the Legislative Affairs Committee had invited the public to comment on proposed legislation. The public responded massively; 7,189 persons submitted more than 80,000 suggestions². The Legislative Affairs Committee also held several important internal discussions of the proposed code. Ultimately, the Standing Committee³

submitted a revised draft to the Eleventh NPC. The Congress approved the new code on 14 March 2012. The new code took effect on 1 January 2013.

The CPC of 2012. The CPC of 2012 contains 290 sections as compared with the 1996 Code's 225 sections. One hundred forty of the 290 sections are either new or amended. An official explanation published by the NPC [5] indicates that the new code addresses eight major issues: 1. rules relating to criminal defense attorneys; 2. the evidence rules that apply to criminal cases; 3. the coercive measures (sometimes called "compulsory measures") that may be used in criminal investigations⁴; 4–5. rules relating to investigative measures⁵; 6. trial procedures; 7. enforcement procedures, and 8. special criminal proceedings.

Criminal Defense: The Most Challenging Part of the 2012 Reform.

Criminal defense is one of the most controversial and most important parts of the 2012 criminal procedure reform. When the CPC of 1979 was adopted, the legal profession was still in the process of being re-established. This made it difficult at that time to balance the prosecution, defense, and adjudication roles. By necessity, criminal defense lawyers played a very limited role in criminal proceedings. In addition, the Lawyers Law, as it existed at that time [7], classified defense lawyers

¹ 1996 CPC Art 174. This Article defines the scope of minor offences as cases for which the punishment is less than three years.

² This total includes comments from important groups such as the faculty at China University of Political Science and Law.

³ For a description of the role of the Standing Committee, see n 11 above.

⁴ European law scholars use the term "coercive measures" or "compulsory measures" to describe criminal justice investigative procedures that can potentially infringe on the basic rights of the accused or others. In the Chinese CPC, the term "coercive measures" is limited to measures that deprive suspects or the accused of their right of liberty. In the 2012 CPC, ch. 6 contains five procedures that can be used to deprive suspects or the accused of liberty during investigations or trials. These measures are (1) summons for questioning (sometimes called "compelled appearance") (ju chuan); (2) obtaining a guarantor pending trial, (sometimes called "bail") (qu bao hou shen); residential surveillance (jian shi ju zhu); arrest (ju liu); and pre-trial detention (dai bu). The Chinese law may be derived from the former Soviet Union CPC.

⁵ This includes technical measures such as wiretapping and other secret procedures [6, Art. 148-152].

as state employees¹. As state employees the defense role was very limited. In some cities in the early 1980s, defense lawyers who wanted to use a not guilty defense for their clients had to secure approval from the head of law firms.

The 1996 criminal procedure reforms made major changes in this system, authorizing criminal defense lawyers to become involved in criminal cases at the investigative stage². The 1996 Code also allowed criminal defense attorneys to collect their own evidence. Vagueness in the wording of the 1996 Code, however, created problems in day-to-day practice. Although the 1996 Code allowed defense lawyers to become involved in criminal cases at an earlier stage than the 1979 Code, it failed to delineate the defense lawyers' role clearly. Instead of authorizing criminal defense attorneys to begin whatever work they needed to perform at the formal start of the prosecution, the 1996 Code authorized only a few specific functions during the investigation (such as offering legal advice [3, Art. 96] or representing the suspect in filing a complaint or reporting a crime) [3, Art. 96]. One very important restriction was that the 1996 Code allowed lawyers to become involved in investigations only after the police had completed their first interrogation of the suspect or completed certain other investigative procedures such as arrest. (Under Chinese law, these procedures are called "compulsory measures.") This meant that under the 1996 Code a defense lawyer was not allowed to represent a suspect during the

first interrogation. The 1996 Code also did not require the police or any other official agency to inform a suspect of his or her right to retain a lawyer. An interpretation of the 1996 Code made jointly by the Legislature and other legal authorities indicated that if a suspect expressed a desire to hire a lawyer but failed to name a specific attorney, the investigator should ask the local bar association to recommend an attorney for the suspect [9, Art. 10]. This interpretation also failed to provide the obligation for informing suspect's right.

The 1996 Code also provided defense lawyers with other limited rights for assisting their clients. The 1996 Code allowed defense attorneys to meet with clients and detained suspects in order to gain an understanding of the facts related to the case. Defense lawyers frequently referred to these rights as the "Three Difficulties" [10, p. 35]. There are conflicting interpretations between the law and regulations. The 1996 Code appears to obligate the police to arrange meetings between defense attorneys and suspects. Only in cases involving state secrets does the meeting between the lawyer and the lawyer's clients need to be approved by investigating organ [3, Art. 96]. A 1998 joint regulation confirms a rule that in ordinary cases approval is not needed for lawyers' visits with their clients. The key issues in cases that involve state secrets are the scope of the "state secret" involved and who has the authority to decide other issues related to the "state secret." In practice, the

¹ Interim Regulations of People's Republic of China on Lawyers Art 1. These regulations were adopted on 26 August 1980, and took effect as of 1 January 1982. In Art 1 of this law said that "Lawyers are state legal workers whose task is to give legal assistance" This regulations became invalid when the first Lawyers Law was adopted in 1996, where the nature of lawyer has been changed into a "profession". The Lawyer's Law was revised again on 27 October 2007, in the Art 2, it says that: "For the purpose of this law, a lawyer means a professional who has acquired a lawyer's practice certificate pursuant to law....".

² The 1979 CPC Art 96 stipulates that criminal defense attorneys were not allowed to begin their representation until the case reached the trial court [8, Art. 96].

police decide which cases involve state secrets and which do not. Although the police decision in such cases is often not transparent, lawyers are rarely in a position to question or challenge the police decision. In practice, the police decide the time and place for meetings between suspects who are detained and their lawyers. The police often justify this kind of control by pointing to the limited number of interrogation rooms and the limited time available for visits. The 2007 amendments to the Lawyer's Law sought to deal with this problem. One amendment indicates that a defense lawyer who is hired by a suspect or a suspect's relatives has a right to meet his or her client when the lawyer shows his or her lawyer's certificate, an authorization letter from the client, or a legal aid office letter. [11, Art.33] The wording suggests that police approval is not required for a lawyer to meet with a client. When the new Lawyers Law came into force in 2008, however, the police began to require lawyers to register when they wanted to meet with their clients. The police said that such registration was necessary because of the limited meeting room space available. This procedure made it possible for the police to continue to regulate attorney visits. Another problem in the 1996 Code is that article 96 allows the police to be present at meetings between attorneys and suspects in "necessary" circumstances. This provision arguably violates international human rights treaties and standards [12, Principle 8, 22] that protect the confidentiality of communications between suspects and defense counsel. International human rights treaties provide that communications between a detained suspect and his or her counsel

may be within sight but not within the hearing of law enforcement officials [12, Principle 8]. The 2007 revision to the Lawyer's Law provided that when a suspect is consulting with counsel, the conversation should not be monitored¹. When this revision was first adopted, legal scholars and some lawyers viewed the new law as a great advance. Interpreting the new law as applying only to electronic monitoring of conversations between lawyers and suspects, however, the police soon began to require that a police officer be present at any "necessary" actual meeting between a lawyer and a suspect.

The 1996 Code allows defense lawyers to see and copy the procedural documents in their clients' case files as well as materials verified by technical experts [3, Art. 36]. Defense lawyers are also allowed to interview and communicate with suspects who are detained. Non-lawyer defenders, however, are allowed such rights only after receiving the permission from the procurator². When the 1996 Code first came into force, lawyers, prosecutors, and judges quickly recognized the law's technical vagueness. They recognized, for example, that both the law and the interpretation failed to provide a clear interpretation as to what "materials" were accessible. Some procurators refused to provide suspects' confessions and witness testimony given during the investigation, materials that are very important for the defense. They provided only evaluations that were made by experts. The 2007 Lawyer's Law enlarges the scope of materials that the police must provide from "technical materials" to "materials in the case file" [11, Art. 36]. In practice, however, the 2007 Lawyer's Law was only partially

¹ In pinyin, this is called "jian ting".

² CPC Art 36 allows non-lawyer citizens who are recommended by an NGO or a quasi-governmental organization (the Code uses the term "people's organization"), or relatives, friends, guardians of the suspects or defendants.

successful. In the early years after adoption of the Lawyer's Law some prosecutors rejected defense requests for disclosure on the ground that the 1996 Criminal Procedure Law had not been revised.

In order to emphasize the court hearing the 1996 Code shifted the trial phase of the new system from the relatively pure inquisitorial model of the 1979 Code to an adversarial model. Under the 1979 Code prosecutors had been obligated to furnish the entire case file to the defense attorney as well as the presiding judge prior to the court hearing¹. The adversarial model, however, has historically required less disclosure than the inquisitorial model. One important (but unintended consequence) of the 1996 criminal procedure reforms was that prosecutors were no longer required to give the entire prosecutorial file to defense lawyers. Instead of the entire file the 1996 Code required prosecutors to provide only a list of the witnesses and a photocopy of the "major evidence" given to the trial court [3, Art. 150]. This greatly reduced defense access to the case file and to evidence that had not yet been transferred to the trial court. This reduced access to the evidence against the defendant quickly became a major problem for defense attorneys in the preparation of a defense.

Following traditional inquisitorial principles, the 1996 Codes restricted a defense attorney's ability to investigate and collect evidence. In fact, in the 1979 Code the lawyer's right of investigation and collection of evidence was absent [3, Art. 37]. If a defense lawyer wanted to get information from witnesses, work units, or other individuals, the defense lawyer needed to have consent from whoever was providing the evidence. If the defense lawyer wanted to visit the victim, the

defense lawyer needed approval from the procurator or the court. In practice, however, defense requests were often refused—often because prosecutors and courts wanted to protect victims. Under the 1979 and 1996 Codes defense lawyers had a right to apply to the procurator and the court to collect additional evidence. In practice, however, applications were rarely approved. These various difficulties greatly weakened the defense. Although the Lawyers Law of 2007 provided some help to defense attorneys, it did not empower them to get information from witnesses, other individuals, and work units without the permission of these groups.

The 2012 Code greatly improves the ability of defense lawyers to assist their clients. The major changes in the 2012 Code are as follows:

1. Giving defense lawyers much broader access to the case file prior to the trial. The 2012 Code broadens the defense attorney's right to access the prosecution's case file. It says, "A defense lawyer may, starting from the date of the procurator's review of the case, access, excerpt, and copy the materials in the case file" [6, Art. 38]. The wording of this provision is similar to that in the 2007 Lawyers Law. The language in the new 2012 Code seems to be clear enough to give defense lawyers a right to access all the facts and materials relevant to the defense.

2. Changing the role of the defense lawyer at the investigation stage from that of "providing legal advice" [3, Art. 96] to that of "being a defense lawyer" [6, Art. 33]. This authorizes defense lawyers to become involved at the investigative phase of a case. The NPC explained this change as follows: "in

¹ Although the 1979 Code contained no clear requirement that prosecutors forward the entire case file to the court which has jurisdiction, in practice prosecutors must do that.

consideration of the fact that a suspect or defendant has the right to a defender throughout the whole procedure, it is advised to insert and set forth that a suspect of a crime may also entrust a lawyer to provide him or her with legal assistance as a defender during an investigation.” The 2012 Code also requires investigators to inform suspects of their right to legal assistance [6, Art. 33].

3. Changing the rules concerning how lawyers meet with their clients.

The 2012 Code confirms the provisions in the 2007 Lawyers Law saying that “no monitoring shall be permitted during the meeting between the defense lawyer and the suspect or the defendant” [6, Art. 37]. Although this confirmation represents great progress, concerns remain about how the term “monitoring”¹ will be interpreted. Some academic experts argue that the new law would be better if it followed the text of the United Nations document that says, “all arrested, detained, or imprisoned persons shall be provided with adequate opportunities, time, and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception, or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials” [12, Art. 8].

The 2012 Code makes it clear that in ordinary cases suspects do not need permission from the police to meet with their defense lawyer (assuming that the defense lawyer has the documents necessary to establish that he or she represents the suspect) [6, Art. 37]. This article gives the police 48 hours to arrange meetings of this kind. Academics suggest that the law here should follow the “Provisions Concerning Several Issues in the Implementation of the Criminal

Procedure Law” jointly promulgated in 1998 [9, Art.15]. The 2012 Code appears to have expanded the kinds of cases that require advance approval. The 1996 Code limited the cases requiring advance approval to those involving “state secrets.” The 2012 Code appears to require advance approval for all cases “involving crimes threatening national security, the conducting of terrorism, and major bribery crimes.” The author has concerns that, if in those above mentioned cases the application would not be approved, that will mean that the suspects would not receive the legal assistance during the investigation. We are also not sure if the defense lawyer could apply for the meeting again after the rejection during the investigation.

4. Greatly expanding the availability of a free criminal defense attorney.

The 1996 Code provided free legal defense services to only three groups of defendants: those who might be sentenced to death, minors, and those who are blind, deaf, or mute. The 1996 Code also gave judges discretionary authority to provide free legal services to defendants who were too poor to hire their own defense attorney. In addition to the categories mentioned in the 1996 Code the 2012 CPC extends the right to a free criminal defense attorney to persons facing life imprisonment and persons with certain lesser mental illnesses. Free legal aid is also now provided at the investigation stage as well as the trial stage of the proceeding. The 2012 Code also allows poor suspects, defendants, and their close relatives to request free legal assistance. If they are eligible, the legal aid organization shall assign the lawyer for them.

In recent years China has done much to develop a system of free legal assistance for vulnerable persons

¹ In pinyin, this is called “jianting”.

charged with crimes. Although China has developed this system very rapidly, the system is still not as extensive as that in some other countries. In 2009 free defense lawyers were provided in 121,870 of the 749,838 criminal cases prosecuted in Chinese courts [13, p. 924, 937]. Two factors that have limited an even more rapid development of legal aid are a shortage of legal aid lawyers and the financial problems of local government. Overall the trend has been positive. The next goal ahead is that of providing a free criminal defense lawyer for every criminal defendant subject to a sentence of five years imprisonment or more¹.

5. Criminal Evidence Rules-Positive Progress. Chinese evidence rules are scattered in three separate procedural codes. There is no unified law of evidence. Because they concern human rights and the conduct of criminal proceedings, the criminal procedure evidence rules are in many ways the most important. The CPC of 1996 contains a chapter on the rules of evidence in criminal cases. This chapter, however, contains only eight articles and has been criticized as being “too general.” It has also been criticized for its lack of an implementation mechanism. It is not surprising therefore that the last 15 years has brought heated debates on such theoretical issues as the standard of proof and such practical matters as implementation and whether a rule excluding illegally obtained evidence should be adopted.

a) Positive progress: preventing the use of illegally obtained evidence. The 2012 Code establishes a rule excluding the use of illegally obtained evidence. China differs from most other countries that use

the continental law tradition. Statements from suspects and accused persons are considered important evidence in China. In practice such statements play a critically important role for practitioners such as police and prosecutors. If a suspect fails to confess, police and prosecutors hesitate to take cases forward to the next phase of proceedings. This kind of hesitation makes obtaining a confession the most important investigative procedure. Although the 1996 Code prohibits the obtaining of statements by means of torture, threats, or other illegal methods [3, Art. 43], it has no rules punishing violations of the law. Even if statements are obtained by torture or other illegal methods, judges tend to use the statements as evidence of the guilt of the accused if the judge thinks that the statements tell the true story. This situation occasionally leads some investigators to use torture to obtain information and has resulted in several miscarriage cases in recent years. Because such practices have been heavily criticized the Supreme People’s Court, as long ago as 1998, adopted a rule stating that if it is proved that a confession was obtained by the use of torture, threats, or other illegal means, the confession could not be used to determine the outcome of a case. Since this rule was adopted, however, few cases have reported the exclusion of illegally obtained confessions. To deal further with issues of this kind in July 2010 the Supreme People’s Court promulgated a Regulation on the Exclusion of Illegally Obtained Evidence. In August 2010 the Supreme People’s Procuratorate and the Ministry of Public Safety jointly published a set of Rules on the Interrogation of Suspects designed in

¹ In China there are no published statistics concerning either the death penalty or life imprisonment. Statistics concerning the number of offenders who receive more than five years imprisonment include the death penalty cases. In 2012, 158296 offenders received sentences imposing more than five years imprisonment. See Law Yearbook of China (Law Yearbook of China Press 2013). P. 1228.

part to deal with this kind of problem [14, Art. 2, Sect. 4]. This indicates that all the major legal institutions are attempting to make sure that the reforms begun by the Supreme People's Court succeed.

The 2012 Code reconfirms the 1996 Code's rules prohibiting the obtaining of evidence by illegal means [6, Art. 50]. The new Code also adds important new language, saying that "no person may be forced to prove his or her own guilt" [6, Art. 50]. This new language goes a long way toward establishing a privilege against self-incrimination, the international norm, as a matter of Chinese law. The 2012 Code, however, did not delete the 1996 Code's language stating that "the criminal suspect shall answer the investigator's question truthfully" [6, Art. 93]. Academics and some legal practitioners are concerned about the possibility that this language conflicts with the privilege against self-incrimination. The 2012 Code also includes a paragraph allowing "leniency to suspects who confess their crime" [6, Art. 118]. This raises concerns about the consequences for suspects who do not confess. What happens if a suspect is then convicted? Is this an indication that the suspect did not tell "the truth" and that his or her punishment should therefore be harsher? Issues of this kind have existed in practice for a long time and could subvert the establishment of the privilege against self-incrimination. Another significant advance contained in the 2012 Code is that the exclusionary rule has been broadened to include physical and documentary evidence that has been illegally obtained as well oral evidence that has been illegally obtained. However, the law has provided two steps to exclude these kinds of evidences, the language it has been used is vague, it says that: "physical and documentary evidence collected in violation of the

legally provided proceedings and severely affecting judicial justice shall be corrected or a proper explanation has to be made, for those evidences which could not be corrected or for which a proper explanation cannot be made, then the evidence should be excluded" [6, Art. 54]. The academics and practitioners challenge the absence of definition of such "correction", and the absence of an established procedure to make the correction. Moreover, "correction" of the illegally obtained physical and documentary evidences may lead to forging of evidence, which is illegal itself. We are expecting the interpretation of this article.

Recognizing that torture and other illegal behavior toward suspects often occurs in the time before the suspect is turned over to a custodial facility, the 2012 Code provides that arrested persons shall be delivered promptly to the custodial facility, maximum to hold the suspect for 24 hours [6, Art. 83].

b) Improved standard of proof in criminal cases. The 1979 and 1996 Codes had no clear standard of proof. To find a defendant guilty the 1996 Code required only that that "a guilty verdict, where the facts of case are clear and the evidence has been verified and sufficient" [3, Art. 162]. During the past two decades, there has been significant debate as to the meaning of "case are clear" and "the evidence has been verified and sufficient." The debaters have not reached a common conclusion. The 2012 Code goes an important step further. It adopts the "beyond a reasonable doubt" standard used in many countries around world [6, Art. 53].

The new Code developed detailed standards both for determining guilt and for sentencing. It establishes three requirements: 1) both conviction and sentencing require proof of the appropriate facts; 2) all the evidence required to decide a case must be verified through

procedures established in the Code; and 3) based on the overall evaluation of the evidence all facts must be proved beyond a reasonable doubt. In the debates leading up to adoption of the 2012 Code the proper standard of proof was one of the most hotly debated issues, particularly among Chinese academics. One group supported the “beyond a reasonable doubt”¹ standard that was eventually adopted. The group opposing the “beyond a reasonable doubt” standard [15, p. 494-496] argued that the purpose of criminal proceedings is to find the “objective truth” as to the events in question.

c) Improved handling of witnesses. The 2012 Code greatly improves the law related to witnesses. The 1996 Code recognized the importance of witness testimony in finding the truth. It also guaranteed the accused a right to confront the witnesses against him or her. Article 47 of the 1996 Code provided that witnesses must present their evidence at the trial and that prosecutors, victims, the accused, and defense attorneys have a right to cross-examine. Only after the testimony of all sides has been heard and undergone verification² could the testimony be used as a basis for deciding the case. The basic idea of the 1996 Code was excellent. After the 1996 Code came into force, however, several defects became clear. The first problem concerned when it was permissible to use written testimony that had never been presented orally in court. At first blush, the 1996 Code appeared to prohibit the trial court from accepting written testimony as evidence from witnesses who did not testify in person at the trial. A different Code section, however, appeared to allow the use of written testimony from persons

who had not testified in person at the trial. To make matters more difficult the 1996 Code failed to specify which witnesses were required personally to testify and which were allowed to give written statements without personally appearing [3, Art. 157].

A second problem in the 1996 Code related the rights of witnesses. The 1996 Code provided few rights to witnesses. One quite general provision obligated courts, prosecutors, and police to protect the safety of witnesses, their family members, and close relatives. The Code also punished several kinds of illegal acts against witnesses [8, Art. 49]. The law, however, failed to provide any detailed protective measures. The law also failed to provide witnesses with a right not to incriminate themselves.

A third problem related to witnesses. Although 1996 CPC (Art. 48) required witnesses to testify in court, it provided no sanctions for witnesses who failed to appear after being summoned.

All these problems come from vagueness and contradictions in the 1996 CPC. Judicial reports indicate that less than 10 percent of all witnesses appear at the trial and give testimony before the court. In some large cities only 1 percent appear [16]. The Supreme People's Court recognized this problem long ago. In 2010, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Security, the Ministry of State Security and the Ministry of Justice published a joint policy statement entitled “The Regulation on Several Issues on Evaluation of Evidences in Handling Death Penalty Cases” In this policy statement the agencies established rules for witnesses. These rules provide that if

¹ The author of this Article belongs to this group.

² In Chinese “cha shi” means that the evidence has been confirmed and that there is no argument from any of the parties.

a witness fails to appear and testify before the court, the witness's testimony in written form cannot be used as evidence in deciding the case.

The 2012 Code strengthens the protection of witnesses in two important ways. First, it requires legal institutions to take special measures to protect witnesses, especially in cases involving crimes that threaten national security or involve terrorism, organized crime, or drug related crimes. The protective measures required include: (1) withholding the witness's real name, address, place of work, and other personal particulars; (2) disguising the witness's personal appearance and voice in any testimony given before a court; (3) prohibiting certain persons from contacting the witness, the victim, and relatives of the witness or victim; and (4) providing special protection to the witness or the witness's residence [6, Art. 62]. The second way that the 2012 Code improves the witness's situation is to reimburse the witness for expenses incurred while providing testimony at the trial. The expenses covered include transportation, accommodation, meals, and wages lost due to absence from work. The 2012 Code obligates all levels of government to appropriate monies to pay such expenses [6, Art. 63].

The 2012 Code also clarifies when witnesses must appear to testify. It provides that when a witness gives a statement that has material influence on the determination of either guilt or sentence and the public prosecutor, the parties (accused, the accused's attorney, victim or representative of victim) object to the use of the statement, or the court believes it necessary for the witness to appear before court to testify, the witness

shall do so [6, Art. 187]. This article also provides that if a police officer is an eye-witness to a crime while on duty, the officer must appear before court to testify. These provisions also apply to expert witnesses. To ensure that witnesses actually appear the court may in serious circumstances detain the witness or expert for a period not exceeding ten days' [6, Art. 188].

While the new 2012 Code requires witnesses to appear when ordered to do so warning and detention are provided, the Code sets forth exceptions for the defendant's spouse, parents, and children. These relatives are not required to testify against the defendant. For the first time the modern Chinese law has tried to balance the crime control need for everyone's testimony against importance of maintaining and respecting trust within the family.

d) Electronic data can now be used as evidence. The 1996 Code recognized seven kinds of evidence. The seventh type was "audio and visual materials." Because technology has been developing rapidly this description failed to electronic data that might be used as evidence. In response to the challenge, the 2012 Code added "electronic data" however, academic experts noticed that, there are overlaps between two types of evidences, it needs to be clarified¹. Anyway, the related issues are internationally challenged, in practice, there will be more new issues that come up, we assumed there would be further interpretation, or explanations.

6. Investigative Procedures: The Most Controversial Part of the 2012 Reform. The law governing police investigations is almost everywhere the most controversial part of criminal procedure. China is no exception. Like

¹ Many academic experts believe that this compulsory measure is too severe and should be replaced by a fine.

² Group of Experts (China University of Political Science and Law), Comments.

other countries China must find ways to fight crime, especially serious crimes, and at the same time protect human rights. The 1996 Code was built on what theorists call a crime control model. It had few judicial controls over police investigative procedures or the work of prosecutors. Although the 2012 Code takes a somewhat different approach, its basic plan continues to be that of a crime control model. Some parts are quite controversial.

a) Technical investigative methods. The technical investigative measures have been surprisingly and eventually provided into 2012 Code [6, Art. 148-152]. Although long used by investigators in practice, technical and covert investigative techniques were not previously regulated by law. The Police Law (1995), for example, contained only a single, very general article concerning technical investigative measures. That article said that “the public security organs, based on the requirement of investigation, after passing strict approval can adopt technical investigative measures” [17, Art. 16]. Although the 2012 Code includes similar provisions, it specifies the kinds of cases for which these special investigative techniques may be used. For the police, the categories are: crimes concerning national security, crimes of terrorism, organized crimes, and major drug related crimes. For prosecutorial investigators the categories include crimes involving serious corruption and bribery as well as major crimes involving abuses of authority that violate the personal rights of citizens [6, Art. 148].

Although this new specificity represents significant progress, the

provisions are still quite general. The new 2012 Code, for example, authorizes the use of technical measures “after passing strict approval requirements.” It should be noted, however, that the new 2012 Code contains no details as to how such approvals are to be given.

b) Changes concerning the use of custody: the most controversial part of the 2012 Code. China uses the term “coercive measures” to describe the various ways that a suspect’s liberty can be limited or can be taken into custody for investigative purposes [6, Art. 64-98].

The 2012 Code’s provisions concerning arrest¹ present a problem. In ordinary cases the Code requires that a detainee’s family be informed of the reasons for detention and the place of custody within 24 hours. When the detainee is suspected of serious crimes that threaten the national security (such as crimes involving terrorist activities), no notice is required [6, Art. 83]. Some top criminal procedure experts say that this is acceptable. This kind of arrest, however, would amount to a form of incommunicado detention, something that is absolutely prohibited by international norms².

7. Improvements in Specialized Criminal Procedures. During the last 16 years, there are several important special proceedings in criminal justice have been discussed, in practice, legal practitioners have made efforts in the pilot projects, for instance, the special criminal proceedings for juvenile delinquents. With this reform, some of vulnerable person’s rights have been paid more attention. The 2012 Code reflects the needs for the development of the society, the new part has been inserted into

¹ In pinyin, this is called “juliu.”

² As required by the International Covenant on Civil and Political Rights (ICCPR) Art. 9, detainees have right “to be brought promptly before a judge or other officer authorized by law to exercise judicial power”, however, in China, detainees have no right to do that..

the law named as: "Special Procedures" [6, Art. 266-289].

a) *Juvenile proceedings.* The 1996 Code contained no separate provisions for the handling of juvenile cases. For many years, however, many prosecutors and courts have used special procedures. In many areas specially designated prosecutors and specially designated judges have been responsible for the handling of juvenile cases. Drawing on this experience the 2012 Code includes a chapter entitled "procedures for cases of juvenile crime" [6, Art. 266-276].

1) The new juvenile justice chapter begins with a statement of principles, saying that "for juvenile delinquents a policy of education, reform, and rehabilitation should be applied." It goes on to say that the goals of the juvenile justice law should "primarily" be accomplished by "applying ... educational measures and regarding punitive sanctions as ancillary means" [6, Art. 266].

2) The new chapter indicates that free legal assistance is available for juveniles charged with crimes.

3) The new chapter requires that pre-trial detention be utilized in a strict and restrictive manner. This means that pre-trial detention shall normally not be used for juvenile cases. When detention is necessary, juveniles charged with crimes shall be held separately from adults [6, Art. 269].

4) If a juvenile is to be interrogated or tried, the legal representative shall be given notice and has a right to be present. If the juvenile's legal representative is not available, a close adult relative, a school representative, or some other related person may be notified as well.

5) Juveniles charged with infringing citizens right of the person and democratic rights, crimes of property violation, or crimes of obstructing the administration of public order may be sentenced to less

than one year's imprisonment, even if the case meets the requirements for prosecution. If the juvenile shows regret, the prosecutor may grant conditional non-prosecution.

6) The case file of juvenile delinquency shall be sealed under several conditions: If a juvenile under the age of 18 commits a crime and is sentenced to a term of less than five years, the case file shall be sealed automatically. When a case file has been sealed, agencies and persons generally are not allowed access to the file, the law provides only two exceptions. One allows prosecutors and judges who are handling another criminal case that is related to the earlier juvenile case to have access to the juvenile's criminal record. The other allows access to the juvenile record when some other criminal justice law or regulation makes this necessary [6, Art. 275].

b) *Reconciliation procedures to be more widely available.* The 1996 Code authorized the use of reconciliation only for cases brought by private prosecutors. In order to pursue the harmony principle in criminal justice and reconcile more societal disputes the 2012 Code greatly broadens the possibilities for using reconciliation as a remedy. To avoid any injustices that this expanded use or reconciliation might create the 2012 Code sets forth the following conditions:

1) The cases shall be considered to be civil disputes

2) The reconciliation may be used only for infringing upon right of person, democratic rights and property rights which provided in the Chapter 4 and 5 of Code of Criminal Law.

3) If the crime is intentional, the possible term of imprisonment must be less than three years. If the crime involves negligence, the possible term of imprisonment must be less than seven years. If the crime involves negligence

related to malpractice, however, reconciliation may not be used.

c) Confiscation of property of accused persons who abscond or die. When a suspect absconds or dies, the 2012 Code allows the suspect's property to be confiscated in cases involving corruption, terrorism, or other serious crimes — even though the underlying charge has not yet been decided. Through this special procedure the CPC of 2012 seeks to fulfill the special obligations imposed by the UN Convention Against Corruption [18, Art. 275] and certain anti-terror resolutions. The 2012 Code's procedures seek to guarantee the fairness of the confiscations.

(d) Compulsory treatment for mentally ill persons who commit violent acts. Persons who inflict violent crimes on others but who are found to be mentally ill are not considered to have committed a crime. Although such persons are not considered to be criminally liable, the state may nonetheless impose compulsory medical treatment. Such proceedings are considered to be administrative in nature and are imposed without a trial. In order to balance the rights of mentally ill persons with the need for public security, the

legislature created a special procedure for considering the imposition of compulsory treatment when the procurator asks for such treatment. The court is required to hold a hearing on the matter. If treatment is authorized, the procurator supervises the enforcement.

Conclusion. The 2012 Code represents a very positive development. It increases the availability of defense counsel to indigent defendants and it improves the exclusionary rule, the privilege against self-incrimination, the rules requiring witnesses to appear at the trial, and the special proceedings established for such things as juvenile delinquency, reconciliation, compulsory treatment for persons with mental illness who commit violent acts, and for the confiscation of illegal property. Although by no means perfect, the 2012 Code taken as a whole represents an important step forward. Citizens should not worry too much about the fundamental issues that still remain in some parts of the criminal justice system. China is still in transition and it is not possible to do everything that is desirable in one big move. The discussion needs to continue.

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Лілінг Юе.

Развиток китайского криминально-процессуального права.

Анотація. Стаття присвячена питанням, пов'язаним з розвитком кримінально-процесуального законодавства Китаю у сучасній історії. Висвітлюються основні положення КПК КНР 1979р., 1996р., 2012р. Звертається увага на зміни в економічній та соціальній сферах Китаю, що призвели до змін у кримінальному процесі. Акцент робиться на одних з найбільш важливих та суперечливих частинах реформи 2012р. — проведенні слідчих дій та захисті у кримінальному процесі.

Ключові слова: кримінальний процес; кримінально-процесуальний кодекс; правова реформа; Китай; КНР.

Лилинг Юэ.

Развитие китайского уголовно-процессуального права.

Аннотация. Статья посвящена вопросам, связанным с развитием уголовно-процессуального законодательства Китая в современной истории. Освещаются основные положения УПК КНР 1979 г., 1996 г., 2012г. Обращается внимание на изменения в экономической и социальной сферах Китая, повлекшие за собой изменения в уголовном процессе. Акцент делается на одних из самых важных и противоречивых частях реформы 2012 года — проведении следственных действий и защите в уголовном процессе.

Ключевые слова: уголовный процесс; уголовно-процессуальный кодекс; правовая реформа; Китай; КНР.





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